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I.A.^{2d} 105

IN THE MATTER OF THE ESTATE OF MILLIE
H. NEWMAN, also known as MILDRED H.
NEWMAN, deceased,

JOHN JAY HARRISON and GERALD H. BLAKE,
Heirs at Law of and Contestants to the
Will of MILLIE H. NEWMAN, deceased,

Appellants,

v.

JOHN P. LOUGHNANE, Executor of the Will
of MILLIE H. NEWMAN, also known as
MILDRED H. NEWMAN, deceased, and
DOROTHY BRUSSE, Proponents of Said Will,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE
COURT.

This appeal is from an order admitting to probate
the will of Millie H. Newman, deceased.

The contestants attended the hearing in the Probate
Court to admit the will to probate and cross-examined the
two subscribing witnesses. The Probate Court entered an order
admitting the will to probate, from which order an appeal
was taken by the contestants to the Circuit Court, where a
like order was entered.

The principal complaint upon this appeal is that
the Circuit Court denied contestants a trial de novo, to which
they were entitled. Bley v. Luebeck, 377 Ill. 50.

The record discloses that on the hearing in the
Circuit Court one of the subscribing witnesses, Mrs. O'Shea,
was cross-examined by contestants. The proponents then

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called the other subscribing witness, Anna Loughnane, who was sworn but not interrogated by proponents, and thereupon proponents offered a certified transcript of the testimony taken in the Probate Court upon the hearing to admit the will to probate, as authorized by section 223 of the Probate Act, Ch. 3, Ill. Rev. Stat., 1955. That section provides:

"At the hearing in the circuit court on an appeal from an order of the probate court admitting or refusing to admit a domestic or foreign will to probate, either party may introduce an authenticated transcript of the testimony of any of the witnesses taken at the hearing on the admission of the will to probate, the proponent may introduce any other evidence competent to establish a will in chancery, and the contestant may introduce any other competent evidence of fraud, forgery, compulsion, or other improper conduct. If the proponent establishes the will by sufficient competent evidence it shall be admitted to probate unless there is proof of fraud, forgery, compulsion, or other improper conduct which in the opinion of the court is deemed sufficient to invalidate or destroy the will."

This transcript was admitted in evidence. Contestants then requested permission to cross-examine the subscribing witness Loughnane. The court denied the request. Contestants then moved to cross-examine this witness under section 60 of the Practice Act, which the court properly denied on the ground that the witness was not a party to the action and could not be cross-examined under section 60. Thereupon, contestants called this witness on their behalf and interrogated her extensively on direct examination.

Contestants argue that the trial court committed error in denying them the right to cross-examine this subscribing witness, and that such denial deprived them of a right to a trial de novo.

In view of our conclusion presently stated, we deem it unnecessary to decide whether, under the circumstances disclosed, the contestants, as a matter of right, were entitled to cross-examine this subscribing witness on the hearing in the Circuit Court. We find nothing in the cross-examination in the Probate Court, and the examination by the contestants in the Circuit Court, which developed any fact establishing, or tending to establish, "fraud, forgery, compulsion or other improper conduct which in the opinion of the court is deemed sufficient to invalidate or destroy the will," as provided in section 223, above quoted.

It is clear from this record that the contestants were not in any wise restricted in the Probate Court hearing, but were permitted to thoroughly cross-examine the two subscribing witnesses. Yet no fact was there developed, upon such cross-examination, to bar the admission of the will to probate.

The issue upon a hearing to admit a will to probate is a very narrow and limited one. In re Estate of Ostrowski, 3 Ill. App. 2d 431; Robertson v. Yager, 327 Ill. 346, 354.

In Bley v. Luebeck, 377 Ill. 50, is a comprehensive review of the original statute and the subsequent amendments, including the present Act, regulating admission of wills to probate, and a review of the cases construing the various statutes on the subject. It was there held (p. 58):

" * * * the right given to the contestant to offer evidence of fraud, forgery, compulsion, or other improper conduct was limited to proof of some trick or device by which a person may be induced to sign

a paper under the impression that it is something else, or to the alteration of the will after it was signed, or the substitution of another paper for part of the will after it had been signed, and matters of like character. (Swirski v. Darlington, 369 Ill. 188; Buerger v. Buerger, *supra*; Oliver v. Oliver, *supra*; Stuke v. Glaser, *supra*.) This rule was in nowise altered or changed by the provisions of the Probate act."

None of the questions asked by the contestants in the hearing in the Probate Court or in the Circuit Court called for any relevant fact which the issue on the hearing would permit, nor did the contestants call any witness, as they had a right to, to prove any fact which would bar the admission of the will to probate under the statute (Bley v. Luebeck, *supra*) and did not make any offer of such proof.

As was pointed out in In re Estate of Walsh, 400 Ill. 454, 459:

"The prima facie case was made by the introduction in evidence of the authenticated transcript of the testimony taken in the probate court. This testimony shows upon its face that the attesting witnesses were of the belief, at the time they signed as witnesses, that the testator was of sound mind and memory. This was sufficient in the circuit court to establish a prima facie case. As was said in the case of Shepherd v. Yokum, 323 Ill. 328, what the witnesses may have believed afterwards is a matter of no consequence."

Upon a consideration of the entire record, we are convinced no serious prejudice to the rights of the contestants resulted from the refusal of the Circuit Court to allow cross-examination of the subscribing witness, Loughnane.

There is no merit in the contention that the transcript of testimony taken in the Probate Court, offered upon the hearing, was not properly authenticated. We find the

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transcript of proceedings in the Probate Court is certified by the Judge of the Probate Court and authenticated by the Clerk of that Court. What was offered in evidence and read into the record upon the hearing in the Circuit Court compares exactly with what appears in the authenticated transcript. The fact remains that the trial judge had before him the authenticated transcript of the testimony taken in the Probate Court.

We find no error in the record to justify a reversal of the order appealed from, and accordingly it is affirmed.

AFFIRMED.

KILEY, J., CONCURS.

LEWE, J., TOOK NO PART.

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JERROL POPE, a minor, by RAYMOND
POPE, his father and next friend,

Appellee,

v.

MAX ROSE,

Appellant.

14 I.A. 106
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff, a minor, recovered a judgment upon the verdict of a jury for \$13,500, for personal injuries alleged to have been caused by the negligence of defendant in driving his car in a northerly direction on St. Lawrence Avenue at the intersection of 44th Place in Chicago. Defendant's motions for a new trial and for judgment non obstante veredicto were overruled, and the judgment appealed from was entered.

The record discloses that on the day of the accident, at about twenty minutes before nine o'clock in the morning, plaintiff, who was then eight years of age, left his home to attend school. He proceeded east on the north sidewalk of 44th Place, and when reaching St. Lawrence Avenue, he looked both to the north and south. As he looked south he saw a car about a block and a half away. He testified he was walking alone, no one was chasing him, and as he reached the middle of St. Lawrence Avenue he heard the screeching of brakes, looked to the right, and defendant's car was right upon him and knocked him down.

It further appears from the evidence that 44th

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Place, going east, ends at St. Lawrence Avenue. On the east side of St. Lawrence Avenue was the Forrestville Elementary School, which plaintiff was attending, and the entrance to that school was located about 22 feet north of the north sidewalk of 44th Place. The Dunbar Vocational School was an advanced school located in the middle of the block to the north of the elementary school.

At the time plaintiff was crossing St. Lawrence Avenue, there were other children crossing the street in the immediate vicinity, all going to school. Defendant, on the morning of the accident, picked up Mrs. Martin and her daughter, who lived at 4344 St. Lawrence Avenue, within the block north of the accident. He had visited them at that address a number of times previously, and he admitted he was familiar with the habits of the school children in the neighborhood. On that occasion he was taking Mrs. Martin and her daughter to look at some real estate, and it was on his return with them in his car that he was traveling north on St. Lawrence Avenue to their home, when the accident happened.

Defendant testified that St. Lawrence Avenue is about 35 feet wide, and that there was a distance of approximately 30 feet between the left side of his car and the curb; that he saw children crossing, so he slowed down and was going about 5 to 8 miles an hour; that he kept on going to the north and crossed 44th Place, when he first saw plaintiff close to a truck parked on the west side of St. Lawrence Avenue near the west curb; that plaintiff was being chased

by another boy, and that plaintiff ran into his car. There is some conflict in the evidence as to whether the accident occurred in front of the Dunbar School in the middle of the block or whether it occurred, as claimed by plaintiff, near the crosswalk at 44th Place and St. Lawrence Avenue, opposite the Forrestville Elementary School. Defendant took plaintiff to the Provident Hospital before police officers arrived at the scene of the occurrence.

Defendant argues that the judgment should be reversed because plaintiff is shown to be guilty of contributory negligence as a matter of law, and for a total failure to prove defendant's negligence as alleged; that the court should have entered judgment non obstante veredicto; that the court erred in refusing to give defendant's instruction No. 14; that the verdict is against the manifest weight of the evidence and is excessive.

We think the evidence in this record presented an issue of fact for the jury, and we should not disturb its verdict unless it is against the manifest weight of the evidence, or unless the court committed reversible error in refusing instruction No. 14. A verdict may not be set aside merely because the jury could have drawn different inferences or because judges feel other conclusions than the one drawn would be more reasonable. Lindroth v. Walgreen Co., 407 Ill. 121, 135; Kahn v. Burton Co., 5 Ill. 2d 614, 623.

The failure, if any, of plaintiff to again look, after he saw defendant's car a block and a half away, does not, as a matter of law, make plaintiff guilty of contributory negligence.

In Moran v. Gatz, 390 Ill. 478, 486, it was said:

"The rule seems to be quite universal that a pedestrian's failure to keep a constant lookout, or to look again after having determined that he can safely cross ahead of approaching traffic, is not contributory negligence as a matter of law but it is a question for a jury whether he was in the exercise of ordinary care for his own safety."

The degree of care a motorist is bound to exercise when he sees children in the street in the vicinity of a school, in a neighborhood with which he is familiar, is stated in Morrison v. Flowers, 308 Ill. 189, 196:

" * * * a person operating a motor vehicle along the streets of a city is bound to recognize the fact that children will be found playing in the street and that they may sometimes attempt to cross the street unmindful of its dangers, and the driver owes the children the duty of reasonable and ordinary care under the circumstances."

Defendant's version of the occurrence is, he saw children crossing the street and observed a boy chasing plaintiff into the street. The rule of care announced in Morrison v. Flowers, supra, and Krug v. Walldren Express Co. 214 Ill. App. 18, affirmed 291 Ill. 472, would particularly apply to defendant.

As was said by this court in Krug v. Walldren Express Co., supra, (page 23), involving plaintiff, a minor, playing ball in the street with other boys, and was injured by defendant's truck:

" * * * It is, however, inferable from the evidence * * * that the driver could, in the exercise of ordinary care-- and we must therefore believe that he did-- observe his environment and, among other things, the boys in the street at their play. Both law and humanity required that, confronted with this condition, he should have proceeded with due care and circumspection not to needlessly injure any of the children in the path of the truck."

1. The first of these is the fact that the Government has not been able to secure the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic of China.

• *Chlorophyll a* (Chl a) is the primary photosynthetic pigment in all photosynthetic organisms. It is a green pigment that absorbs light energy in the blue and red regions of the visible spectrum. Chl a is essential for the light-dependent reactions of photosynthesis, where it converts light energy into chemical energy in the form of ATP and NADPH.

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Journal of Management Studies, 19(1), 67-80.

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It is true that one of the charges in the case last cited was wilful and wanton negligence. Nevertheless, the statement quoted should apply even in the absence of a wilful and wanton charge.

Due regard for the safety of children would require defendant, under the circumstances in the instant case, if necessary, bring his car to a stop (Jenkins v. Goodall, 183 Ill. App. 633; Kessler v. Washburn, 157 Ill. App. 532, 537), when he could reasonably anticipate that plaintiff might run into the street and in front of his car. As was said in Kahn v. Burton, *supra*:

"All men are presumed to know those things which are matters of common knowledge and must be held, in the absence of actual knowledge or notice, to have reasonably anticipated such occurrences as in the ordinary nature of things reasonable men should know will probably occur."

Thus, it was clearly within the province of the jury to determine the questions as to the contributory negligence of plaintiff, if any, and the negligence of defendant, if any. Its verdict is not against the manifest weight of the evidence.

We think the refusal of the court to give defendant's instruction No. 14, relating to sudden and imminent danger, is not error, since defendant's given instructions Nos. 8, 9 and 10 sufficiently covered the subject matter of the refused instruction.

As to the excessiveness of the verdict, we think the injury in question, with its attendant pain and suffering,

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justified the size of the verdict. Ford v. Friel, 330 Ill.
App. 136, 140.

The judgment is correct, and it is affirmed.

AFFIRMED.

KILEY, J., CONCURS.

LEWE, J., TOOK NO PART.

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46447

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. RAYMOND J. HAHN, CLARENCE
FINUCANE and DONALD MOSCATO,

Appellants,

v.

STEPHEN E. HURLEY and ALBERT W.
WILLIAMS, Members of the CIVIL
SERVICE COMMISSION OF THE CITY OF
CHICAGO, and LLOYD M. JOHNSON,
Commissioner of the Department of
Streets and Sanitation of the CITY OF
CHICAGO,

Appellees.

14 I.A.²¹ 107

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This is a mandamus action to compel certification of relators to civil service positions as sign hangers. The trial court denied the prayer for the writ. This court reversed. (7 Ill. App. 2d 107.) The Supreme Court reversed the judgment of this court and remanded the cause here to dispose of an undecided issue. (9 Ill.2d 74.)

For a detailed statement of the facts see the opinions cited. The issue undecided by this court in its former opinion is whether the civil service examination for sign hanger, given April 11, 1953, was sufficiently practical and relevant to test the relative capacities of the applicants. (People ex rel. Hahn v. Hurley, 7 Ill. App. 2d 107, 111.) The question arises from section 6 of the Civil Service Act for Cities (Ill. Rev. Stat. 1953, chap. 24-1/2, para. 44): "Such examinations shall be practical in their character, and shall relate to those matters which will

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DEPARTMENT OF THE ARMY
WASHINGTON, D.C.

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NAME

ADDRESS

CITY

TO THE
ATTENTION OF
THE
OFFICE OF THE
CHIEF OF BUREAU
OF THE
DEPARTMENT OF THE ARMY
WASHINGTON, D.C.

Very respectfully,
Yours very truly,
[Signature]
[Name]
[Title]
[Department]
[Address]
[City]
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fairly test the relative capacity of the persons examined to discharge the duties of the positions"

Relators contend that 41 of the 75 questions asked violated the statutory prescription. We have read the questions and are unable to agree with this contention. Except for the unclearness of questions 28, 29, 30, 31, and 34, we see no unfairness. Questions 1 through 6 relate to support of signs; 10 through 13 refer to lifting of signs, 19 through 23 test the interest of the candidates through inquiries about sign colors and shapes; 14 through 18, 24 through 27, and 32 through 34 test the prudence of candidates in public relations and personal and crew safety. We think these questions are practical, though not all technical, and are relevant to a fair test for the position of sign hanger. It is admitted that all other questions are proper.

The Supreme Court decided that defendants did not violate the Civil Service Act by failing to include physical and health tests in the sign hanging examination. (9 Ill. 2d 74.) We now decide that there is no showing that the examination was not practical or did not relate to matters which fairly tested the relative capacities of the candidates to perform the function of sign hangers. For the reasons given the judgment is affirmed.

AFFIRMED.

FEINBERG, P.J. CONCURS.

LEWE, J., TOOK NO PART.

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46914

LOUISE M. SHEMAITIS,

Plaintiff,

v.

CHARLES J. SHEMAITIS,

Movant-Appellant.

LeROY F. FROEMKE, Purchaser at Partition
Sale and Petitioner for Writ of
Assistance therein,

Respondent-Appellee.

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I.A.^{2d} 108

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

Charles Shemaitis seeks to appeal from an order refusing to entertain a "motion to dispose of the motion to dismiss heretofore filed by . . . him, on July 27, 1948." Respondent Froemke has moved to dismiss the appeal.

November 3, 1947, Shemaitis' wife sued him and others for partition of real estate. Shemaitis appeared and was represented by counsel. A partition decree was entered March 4, 1948, and a sale ordered March 29, 1948. Froemke, respondent in this case, purchased at the sale for \$8,450 and the sale was subsequently confirmed and distribution ordered. Shemaitis refused his distributive share of the money and it was deposited with the clerk of the court. Shemaitis also refused to surrender possession to Froemke, who, on July 23, 1948, filed a petition to enforce his right of possession. July 27, 1948, Shemaitis filed a motion to dismiss the petition. On November 9, 1948, without a hearing on Shemaitis' motion to dismiss, the court granted the prayer of Froemke's

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$$\frac{1}{2} \left(\frac{1}{2} \right)^n = \frac{1}{2^{n+1}} \quad \text{and} \quad \frac{1}{2} \left(\frac{1}{2} \right)^n = \frac{1}{2^{n+1}}$$
[illegible]

• **Prevalence** = the proportion of a population that has a disease at a particular point in time

... ..

Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains. The number of transformed cells was determined by the number of colonies obtained on the selective medium. The results are the mean of three independent experiments. Error bars represent standard deviation.

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17. The Commission has been informed that the Government of the Republic of the Philippines has agreed to accept the findings of the Commission and to take the necessary steps to ensure that the rights of the victims of the 1972-1973 military operations in the Philippines are protected and that the rights of the victims of the 1972-1973 military operations in the Philippines are protected.

"SOCIETY OF THE FUTURE" 100

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for the purpose of "transferring" the "dead" to the "living."

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introduced to them in 1934. The first of these was the

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standard. In cases of "discrepancy" between the two methods, the 1998

petition and ordered Shemaitis to deliver up possession. It is this motion to dismiss which Shemaitis sought to have disposed of on October 10, 1955. It is the order refusing to entertain the "motion to dispose" which Shemaitis seeks to have reviewed here.

Though the trial court did not formally pass on the motion to dismiss, it effectually denied the motion by entering the decree on November 9, 1948. This decree was consistent only with denying the motion. (Ferris v. Commercial Nat. Bank, 158 Ill. 237.) There was, therefore, no motion pending subject to Shemaitis' "motion to dispose", and the trial court properly refused to entertain the motion.

The grounds relied on in the "motion to dispose" are the same as those asserted in two suits in the nature of bills of review filed by Shemaitis to set aside the partition decree. Both suits were dismissed. This court denied leave to appeal in the first (Gen. No. 45879) and affirmed the order of dismissal in the second. (Shemaitis v. Shemaitis, 6 Ill. App.2d 324.) In the latter decision, this court said that the dismissal of the first suit in the nature of a bill of review "is conclusive and bars the plaintiff from again bringing these matters into litigation." Leave to appeal from that decision to the Supreme Court was denied March 18, 1957. Our decision in that case is final and controls this appeal. (Shudnow v. City of Chicago, 338 Ill. App. 657.)

For the reasons given the judgment is affirmed.

AFFIRMED.

FEINBERG, P.J., CONCURS.
LEWE, J., TOOK NO PART.

11. "The above information is being furnished to you for your information and is not to be used for any other purpose. It is to be kept confidential and is not to be disclosed to any other person without the express written consent of the Bureau. It is to be destroyed when it is no longer needed for the purpose for which it was furnished." (b)(7)(D)

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Circuit Court of Cook and
County, Illinois.

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Referenda on Abolition.

This is an appeal by the defendants-appellees from a judgment for \$632.84, and costs, in favor of the plaintiffs-appellees, based upon a complaint filed September 27, 1951, for cleaning services and materials furnished by the plaintiffs to the defendants on 38 fur coats, and for certain other cleaning services as to which there is no dispute. The defendants' answer, October 5, 1951, in substance, admitted \$74.84 was due, which amount was tendered into court, but denied owing the balance of the amount on the ground that the services rendered as to the coats which are in dispute were defective and improper and destroyed the value of the coats. The \$632.84 involved in the plaintiffs' claim consists of \$380.00 of charges at \$10.00 per coat for 38 coats,

\$178.00 for lengthening 1 coat, stretching 11 coats and 1 jacket, and for certain oil, and \$74.84 for the undisputed items. After the answer was filed the defendants were given leave to file a counterclaim, and did so on January 7, 1953. The defendants in their counterclaim alleged, in substance, that the plaintiffs entered into a contract with the defendants to clean all such coats and to restore them to their original condition, for a special contract price of \$10.00 each; that there was an implied contract the work should be done with due care and that when completed the coats should be reasonably fit for wear by the owners; that the plaintiffs performed the work negligently, the coats were not restored to their original condition, but were returned shrunk, dry, brittle, and unfit for wear; and that the defendants were damaged thereby in the sum of \$3000.00. The plaintiffs' answer to the counterclaim denied the material allegations thereof. The cause was heard by the Court without a jury, and there were two separate written opinions of the Court, at different times, in connection with the entry of the final judgment, which found the issues under the complaint, answer, and counterclaim in favor of the plaintiffs.

It is the theory of the defendants that the Court committed error by not finding that the plaintiffs' duty, as bailee, was not merely to use reasonable care in cleaning the coats, but, as a matter of implied warranty, to use that degree of reasonable care and skill required by their alleged undertaking, or the alleged nature of the bailment, so as to restore the fur coats in such a manner as to make them reasonably fit for the purpose intended, namely, wear by the owners; that the defendants are not barred from enforcing such alleged implied warranty; that the plaintiffs did not sustain the burden of proof on them as to due

care and skill, under the complaint; and that the defendants did sustain the burden on them as to the plaintiffs' lack of due care and skill, under the counterclaim.

It is the theory of the plaintiffs that the Court found the plaintiffs used reasonable care in cleaning the coats, and that the plaintiffs had not guaranteed to restore them to their original condition, that the evidence supports the findings, and the judgment is not contrary to the manifest weight of the evidence.

It appears that the plaintiffs were cleaners and furriers, under the name of Vander Beke's, a partnership, with a place of business in East Moline, had been in business some 26 years, and usually cleaned between 6000 and 7000 furs each year; the defendants were retail clothiers in that city; the defendants had 38 fur coats and jackets in a tarpaper lined room in the basement of their store on August 11, 1949; the coats belonged to customers of the defendants and had been sold under a plan which included storage for 2 years. On that date the basement in which the garments were stored was completely flooded, as a result of unusual rains, the coats were under water for about two days before they could be brought up to the first floor, sewage had backed up, and the coats were soaked with water and covered with mud, paper, and sewage. They gave off an unpleasant odor. There is some difference of opinion in the evidence as to there being sewage damage or an odor.

The defendants called the plaintiffs and asked them to pick up the coats for cleaning, after which, being about a week after August 11, 1949, the plaintiffs took the coats to their establishment in a delivery truck. Lawrence Vander Beke, one of the plaintiffs, and his brother picked them up at the defendants' store,

It appears that the Shellville was Nisqually and TONGUE.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

has attended all the fall and winter trials and about
November will have been removed to a hospital and will be
in the hands of the medical staff and will be kept in the
hospital until the fall of 1914 when he will be sent to
the front.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom as to whether or not it has any plans to introduce legislation to give effect to the recommendations of the Commission's report.

and he says there was no discussion at all between him and the the defendants' manager or anyone else as to just what work the plaintiffs were to do on the coats. He says he did not then know the defendant Stone or the defendants' manager, Mr. Fisher. The defendant Stone testified, however, that he and Lawrence Vander Beke had a conversation at the defendants' store 2 or 3 days after the storm at which Vander Beke said they could take care of the mud and water on the coats, "we can clean that out", and as to price he'd have to find out what it would run. The defendants' Manager, Fisher, said he and Lawrence Vander Beke had a little conversation at the store a few days after the storm, in which Vander Beke said he did not think the furs would be hurt and thought they could be cleaned. Fisher says he remembers the defendant Stone and Lawrence Vander Beke talking at the store the same or next day, but did not hear any of that conversation.

When one of the plaintiffs, Clara Vander Beke, saw the condition of the coats, she testified she telephoned the defendant Stone to the effect that she was going to send the coats back. Stone's reply was that he did not know what to do with the coats, for her to do the best she could, and he would be satisfied if she could save one-third of the coats. Mrs. Vander Beke then told Stone that they would have to charge \$25.00 per coat. Stone told her that he did not have the coats insured and could not afford that figure. Mrs. Vander Beke then stated that she would just clean the coats for \$10.00 each, - no oiling and no stretching, - provided Stone would do the oiling and stretching and put the linings back in himself, and that the plaintiffs could not guarantee anything because of the bad condition of the coats. She testified

the first thing I noticed when I stepped out of the car
was the smell of the sea. It was a fresh, salty
smell that I had never before. I had been told that
the air in the south was different, but I didn't
know it would be so different. I had been told that
the people were friendly, but I didn't know they
would be so friendly. I had been told that the
scenery was beautiful, but I didn't know it would
be so beautiful. I had been told that the food was
good, but I didn't know it would be so good. I
had been told that the people were different, but I
didn't know they would be so different. I had
been told that the scenery was beautiful, but I
didn't know it would be so beautiful. I had
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different, but I didn't know they would be so
different. I had been told that the scenery was
beautiful, but I didn't know it would be so
beautiful. I had been told that the food was
good, but I didn't know it would be so good.

Stone then told her to go ahead, and the plaintiffs did so. The defendant Stone testified he did not talk with Wre. Vander Beka, but that several days after his and Lawrence Vander Beka's talk at the store Lawrence and he talked on the phone, Lawrence at first saying the price would be \$25.00 per coat and they would guarantee the same, Stone not agreeing, then Vander Beka saying \$10.00 per coat for cleaning only, Stone to do the oiling, and put the linings and shoulder pads in, to which Stone agreed, and the plaintiffs picked the coats up after that. Lawrence Vander Beka denied having any telephone talk with Stone.

The plaintiffs, on account of the condition of the coats, had to do the work personally, i.e., their employees would not work on them, and spent about three weeks cleaning them. They took out the linings, which they washed and dried, and then they dry cleaned, sized, and finished the linings. They took out the shoulder pads and facings and provided new pads and facings. They used rubber gloves and shampooed all of the furs by hand, after which they dried the furs, put them in drums, and cleaned them with sawdust, which was evidently the customary method. The plaintiffs then delivered the coats to the defendants, and some neats-foot oil, and showed the defendants how to oil them, which the defendants undertook to do. The coats were returned between November 1 and December 31, 1949. The defendants made no complaint then as to the plaintiffs' work. The linings had previously been finished and delivered to the defendants. The stretching and blocking had to be done after the pelts had been oiled. The defendants had no equipment for stretching and blocking, and they asked the plaintiffs to stretch and block some of the coats, which the plaintiffs did, at varying charges, usually \$15.00 per coat, in addition to the previously mentioned \$10.00 per coat charge, - the defendants having told the

plaintiffs those particular coats had shrunk and needed stretching. The defendant Stone says the coats were stiff and brittle when returned by the plaintiffs and one or more were torn. The evidence on behalf of the plaintiffs is that the immersion under water of these coats would remove the natural oils and make them dry and brittle and the only way to correct that was to replace the oil by oiling the pelts. The defendants were to do and did do the oiling and put the linings back in.

The defendants apparently did not disclose to the owners of the coats, unless the owner was dissatisfied upon delivery of the coats, that they had been stored in a tarpaper lined room or that they had been in a flood and covered with water, mud, etc., and that it had been necessary to have them cleaned. The defendants made various adjustments, of one kind or another, with their customers who owned the coats, which cost the defendant \$1673.99, though the adjustments were not cash refunds, and those adjustment "losses" are the basis of the counterclaim. Of the 38 coats involved in the dispute, about 14 were kept by the defendants' owner customers, with apparently no, or little, real dissatisfaction, and no specific adjustments were made on those particular coats, though the defendants say they gave those owners some discounts on subsequent purchases, to "keep them satisfied", - one of the witnesses for the plaintiffs, a former employee of the defendants, had her own fur coat involved in the flood, it was among those cleaned by the plaintiffs, and she said she was now wearing it currently and it was o.k.; about 24, however, were so unsatisfactory to the defendants' customers that specific adjustments, such as giving them new coats, or other merchandise, at discounts, had to be made on them.

The plaintiffs rendered a statement of the account to the defendants about January 1, 1950. A few weeks later one of the plaintiffs called and asked for payment. The defendant Stone then asked for an additional discount. He made no complaint then about the quality of the plaintiffs' work. They declined any additional discount. Stone refused to pay, and this suit eventually followed.

One of the principal questions of fact at the trial was whether the plaintiffs expressly "guaranteed" their work in cleaning the coats. The Court, *inter alia*, found that issue in favor of the plaintiffs, to the effect they had not, and the defendants accept that determination and are making no issue of that finding on this appeal. The other issues are whether there was an implied warranty by the plaintiffs; whether the defendants are barred from enforcing such implied warranty, if there were any; whether the plaintiffs sustained their burden of proof under the complaint; and whether the defendants sustained their burden of proof under the counterclaim.

This was a bailment for compensation or hire, - one type of bailments for the mutual benefit of the bailor and bailee, - in which the plaintiffs were the bailees and the defendants were the bailor: 4 ILL. L. and P., p. 663; the terms of the contract of bailment are controlling with respect to the rights and duties of the bailor and bailee: 4 ILL. L. and P., p. 666; an ordinary bailee is not an insurer of the subject of the bailment, and, unless he enlarges his responsibility by contract, he is liable only for loss or damage to the property resulting from his negligence, - negligence in the care of the property is the basis of the bailee's liability, - the parties may increase or decrease their rights by express

contract, but a provision enlarging the bailee's liability must be in clear and unmistakable language: 4 ILL. L. and P., p. 667-669; RHODES v. WARSAWSKY et al. (1926) 242 Ill. App. 101; JACOBS v. GROSSMAN (1923) 310 Ill. 247; SCHEN v. WALLACE (1948) 334 Ill. App. 294; where the bailment is for the mutual benefit of the bailor and bailee, the bailee, in the absence of special contract, is held to the exercise of ordinary care with respect to the subject matter of the bailment, - i.e. such care as an ordinarily or reasonably prudent man would take of his own goods of like character under similar circumstances: 4 ILL. LAW and P., p. 670; RHODES v. WARSAWSKY et al., supra; STANDARD POWDER CO. v. HENLS and CURTIS MALTING CO. (1898) 171 Ill. 602; SCHALTER v. WASHINGTON SAFETY DEP. CO. (1917) 281 Ill. 43; cf. MILES v. INTERNATIONAL HOTEL CO. (1919) 289 Ill. 320; a bailee who agrees to perform services with respect to the property bailed must fulfill his undertaking in accordance with his agreement, - if skill as well as care is required and if the bailee purports to have such skill he must use a degree of skill adequate to the due performance of his undertaking: 4 ILL. L. and P., p. 674; a bailee is entitled to compensation for services performed in connection with the bailed property under the contract of bailment, - his right to compensation being dependent on the terms of the contract: 4 ILL. L. and P., p. 676; the bailee has the obligation to redeliver to the bailor the identical property bailed, but this may be fulfilled even though the property is so changed in appearance that it cannot be identified, if the bailee has not been wanting in due care with respect to the property: 4 ILL. L. and P., p. 679; as in other civil actions, in actions between a bailor and bailee the burden is on the plaintiff

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to establish the essential elements of his cause of action, and the defendant has the burden of sustaining a counterclaim interposed by him; in an action, or counterclaim, by a bailor for damage to bailed property, the burden of proof is on the bailor to show that the property was in good condition when delivered to the bailee, but proof of delivery thereof in good condition and return by the bailee in a damaged state creates a presumption of negligence on the part of the bailee, or makes a so-called prima facie case, and casts on the bailee the burden of going forward with evidence to show the damage occurred without his fault, but such does not shift the ultimate burden of proof from the bailor to the bailee, - the bailor must, in all instances, ultimately prove the bailee was negligent, - it merely shifts the burden of proceeding or going forward with the evidence, - and even that burden is not cast on the bailee where his lack of negligence affirmatively appears from the bailor's testimony or possession of the bailee is not actual: 4 Ill. L. and P., p. 681-685; REID v. WANDANSKY et al., supra; MILES v. INTERNATIONAL HOTEL CO., supra; HOLLANDHEAR MOTORS CO. v. CHOGAN (1949) 536 Ill. App. 483.

We believe the Trial Court correctly found that the preponderance of the evidence indicates that the plaintiffs' first proposal was to do the work for \$25.00 per coat, and to guarantee the work; that the defendants objected, and the plaintiffs and defendants then agreed to a price of \$10.00 per coat for cleaning only, - no oiling and no stretching, - the plaintiffs to take out the linings and clean them, (and evidently provide new shoulder pads and facings), the defendants to put the oil back in the belts, stretch the coats when needed, and put the linings, pads, and facings back in, and that this undertaking of the plaintiffs, because

of the condition of the coats when they came to the plaintiffs, was not expressly guaranteed. That was the contract of bailment and it controls as to the rights and duties of the bailor and bailee. The allegations of the counterclaim that the plaintiffs contracted to restore the coats to their original condition were simply, in effect, found not proved by the Trial Court and the evidence sustains that finding, and the further allegation of the counterclaim that there was an implied contract that when completed the coats should be reasonably fit for wear by the owners finds no support, under similar circumstances, in any of the principal Illinois cases cited by the defendants.

The plaintiffs, as ordinary bailees, were not insurers of the subject of the bailment. Unless their responsibility was enlarged by the contract of bailment, and the evidence does not indicate it was, they are liable only for damage to the property resulting from their negligence. They are held to the exercise of ordinary care with respect to the property, and to the use of a degree of skill adequate to the due performance of their undertaking. There is no clear and unmistakable language enlarging their normal bailee's liability.

There is no direct evidence of negligence by the plaintiffs in the cleaning process, or of any failure to use a degree of skill adequate to the due performance of their undertaking. Neither the evidence or briefs suggest anything in the cleaning process done by the plaintiffs which should not have been done, or anything not done that ought to have been done, as a matter of either ordinary care, or skill. There are the circumstances, urged by the defendants, of the shrinkage of some of the coats, their

dry, brittle, and stiff condition, and the tearing or ripping of some, from which the defendants urge an inference or conclusion of negligence or lack of use of skill. Those circumstances were proper elements for the Court to consider, along with all other material evidence and circumstances, in drawing its inference or conclusion of negligence or no negligence, or the use of or failure to use a degree of skill adequate to the due performance of the undertaking. But those particular circumstances were only a part, and by no means all, of the evidence and circumstances to be so considered. All of the evidence had to be taken into account, including, among other things, the background, condition, and circumstances of these coats when they came to the plaintiffs, the plaintiffs' experience in their business, the loss of natural oils in the pelts from the immersion in water etc. at the defendants' store (and from the necessary shampooing by the plaintiffs, we presume), the defendants' recognition of the apparently desperate condition of the coats by their comment they would be satisfied if the plaintiffs could save one-third of the coats (as the plaintiffs' evidence indicates), the actual steps the plaintiffs took as to the coats, the facts the plaintiffs were not to do the complete process and as to the defendants being obliged to complete and finish them themselves by oiling, stretching etc., that about 14 coats (being, incidentally, more than 1/3 of the 33 involved) were, in last analysis, kept by the defendants' customers with no, or little, real dissatisfaction, and no specific adjustments thereon, and the rather significant circumstances that the defendants accepted the coats without complaint at the time of delivery, or at the time of the presentation of plaintiffs' statement, as to the character of the work, or any complaint until they filed their

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answer in the present suit about two years after the coats had been returned, and without seeking to recover, affirmatively, any alleged damages until their counterclaim herein more than three years after the coats had been returned.

As in other civil actions, the burden was on the plaintiffs bailees to establish the essential elements of the cause of action alleged in the complaint, - the only controverted allegation being that the defendants were indebted to the plaintiffs for services and materials sold and delivered by the plaintiffs to the defendants at their instance in the amount of \$632.84. The plaintiffs admittedly did the work requested, the price charged for cleaning the 38 coats was that agreed upon, and there is no contention the other charges for other claimed items are unreasonable. The allegation of the defendants' answer that the cleaning services rendered were of a defective and improper character and destroyed the value of the clothing is really a matter of affirmative defense on which the burden of proof would be on the defendants, but even if such be an essential element of the plaintiffs' cause of action the evidence is such the Court could, under the circumstances here, properly find they satisfied the burden. In any event, the defendants bailees had the burden of sustaining their counterclaim and the evidence is such the Court could properly find they had not satisfied that burden. Insofar as the counterclaim related to alleged negligent or unskillful acts by the plaintiffs the ultimate burden was on the defendants bailees to prove the bailees were negligent or did not use a degree of skill adequate to the due performance of their undertaking. Under the circumstances, including particularly the fact that the goods were not delivered to the bailees in good condition, the re-

turn thereof by the bailees in a "damaged" state, if they could properly be considered so, does not in this case create the usual presumption of negligence of the bailees or cast on them the burden of going forward with the evidence, but even if that usual presumption prevailed the plaintiffs did so go forward and the ultimate burden of proof still rests on the defendants bailors.

The matter of drawing a proper inference or conclusion of negligence, or no negligence, and the use or non-use of a degree of skill adequate to the due performance of the plaintiffs' undertaking, from all the evidence, direct and circumstantial, is a question of fact, primarily for the Trial Court, and we are not at liberty to disturb the inference or conclusion so drawn if it is reasonably supported by the evidence, and is not against the manifest weight of the evidence. The cause having been heard without a jury, the Trial Court's findings on questions of fact are entitled to the same weight as those of a jury's verdict. There is competent evidence which, standing alone, together with all reasonable inferences and inferences in its aspect most favorable to the plaintiffs, fairly tends to prove the essential elements of the plaintiffs' case, and, hence, had there been a jury, a motion by the defendants for a directed verdict or judgment notwithstanding the verdict could not have been allowed. Weighing the evidence, not to determine its preponderance, as an original matter, but only to determine whether the judgment be contrary to the manifest weight thereof, we cannot say it is contrary to the manifest weight, and hence, had there been a jury a motion by the defendants for a new trial could not have been allowed. It may not be set aside merely because in some respects the evidence be conflicting, as it is: COMPTON v. SCHOOL DIRECTORS etc. (1935) 3 Ill. App. (2) 243.

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We've read the principal Illinois cases cited by the defendants, namely: WIEGERT v. DAVIS CLEANERS etc. CO. (1929) 254 Ill. App. 63; PECK v. BREWER et al. (1968) 43 Ill. 54; WARNER v. DUBNAYAN (1960) 23 Ill. 324; BRICKTON v. GRAHAM etc. CO. (1923) 227 Ill. App. 390; MOORE v. FISHER (1927) 245 Ill. App. 567; CHICAGO GERMAN HOOD CARRIERS UNION etc. v. SECURITY TRUST etc. CO. (1924) 315 Ill. 204; KNITH et al. v. BLISS (1901) 10 Ill. App. 424; NICHOLS v. UNION STOCK YARDS etc. CO. (1915) 193 Ill. App. 14; SHERTS v. STAR CLEANERS etc. INC. (1925) 235 Ill. App. 323. We do not believe them at variance with our views or that they require a different conclusion.

The judgment, therefore, should be, and is affirmed.

A F F I R M E D

Wm. P. J. Concurr
Eovaldi, J. Concurr

Exhibit 1. Council

47013

14 I.A.^{2d} 110

STANLEY ALEXANDER,

Appellant,

v.

MARILYN ALEXANDER,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint for divorce on the ground of desertion. The court heard the evidence and entered a decree denying plaintiff's relief.

The only point urged to reverse this decree is that the evidence for defendant has no probative value and did not overcome the evidence for plaintiff.

The court heard and saw the witnesses and was in a better position to judge their credibility than we are, and we should not disturb the chancellor's finding unless it is against the manifest weight of the evidence. The burden of proof was upon plaintiff, and the chancellor could, upon the evidence, determine plaintiff had not sustained the burden.

The decree is affirmed.

AFFIRMED.

KILEY, J., CONCURS.

LEWE, J., TOOK NO PART.

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47026

GEORGE C. PARKER,

Appellee,

v.

BERNAT BUILDING CORPORATION, a
corporation,

Appellant.

14 I.A. 110²⁹

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff, a real estate broker, brought this action to recover a commission for procuring a tenant for defendant. A trial with a jury resulted in a verdict and judgment for plaintiff, and defendant appeals.

There is conflict in the evidence as to whether plaintiff was employed as a broker, and whether he was the procuring cause.

The evidence discloses that defendant inserted a blind ad in one of the daily newspapers, offering space in its building. Plaintiff answered the blind ad and then received a call from one of the representatives of defendant, acknowledging receipt of his letter and advising him that they were offering space at ninety cents per square foot. Plaintiff's evidence tends to prove that he was in communication later with defendant's representative and advised him that he had contacted another broker, who had a prospect for the space, and that the prospect was willing to pay one dollar per square foot. The difference of ten cents per square foot for the space desired by the prospect amounted

to approximately \$25,000. Plaintiff testified that he told defendant's representative that defendant would have to pay the co-operating broker a commission and a like commission to plaintiff, if they were able to obtain a tenant who was willing to pay one dollar per square foot. Although defendant's representative denied such a conversation with plaintiff, there are circumstances disclosed by the evidence which tend to corroborate plaintiff's testimony. Part of such corroboration is embodied in the letter of December 11, 1951, from plaintiff, addressed to the attention of Mr. Share, defendant's representative, and introduced in evidence by defendant, which in part reads as follows:

"In line with our several conversations on the above, we had a lot of brokers who did not mean business - so we therefore did not contact you.

"Now through Lang, Weise & Cella, Mr. Chas. Hood, we have come up with a fine prospect (who can meet your standards) whom you met last week, namely -- (December 7, 1951)

Mr. Rothschild Vice Pres.
Standard Cap & Seal Company

"They inspected your building on the proper lease basis and a rental of one dollar (\$1.00) a square foot.

"In our conversation to save you money, I quoted \$6,000.00 expense to build offices and I understand your Mr. Share raised this amount to \$7,500.00. Of course Mr. Share you can spend any amount you wish - but I was only trying to hold the amount down."

It is undisputed that it was plaintiff who first contacted the co-operating broker, and that the prospect entered into the lease for the space in question. The sharp conflict in the testimony centers around whether plaintiff informed defendant's representative that he would also expect a commission similar to the one paid to the co-operating broker.

The jury saw and heard the witnesses, and we should not disturb their finding and the judgment entered thereon, unless we are satisfied they are against the manifest weight of the evidence. Roller v. Kurtz, 6 Ill. 2d 618. We think the evidence amply supports the verdict and judgment.

We have examined the several instructions given for plaintiff, about which defendant complains, and defendant's refused instruction No. 13. The complaint made about plaintiff's given instructions is without merit. We think they correctly state the applicable rule of law. The court was justified in refusing defendant's instruction No. 13. It was a peremptory instruction that did not correctly state the law and withdrew from the jury the element of procuring cause. Defendant's given instructions Nos. 10, 11 and 12 adequately presented defendant's theory to the jury.

The judgment is affirmed.

AFFIRMED.

KILEY, J., CONCURS.

LEWE, J., TOOK NO PART.

46974

PHILIP SLAN, GEORGE SLAN and MAX
SCHMETTER,

Appellees,

v.

ALBERT JOHNSON, EDWIN JOHNSON, and
HIGH-LOW TANK CAR SERVICE STATIONS,
INC., a corporation,

Appellants.

14 I.A.^{2d} 111

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This is a chancery suit for a determination of the interests of plaintiffs in defendant High-Low Tank Car Service Stations, Inc., referred to herein as High-Low, and for an accounting. The Chancellor fixed the interest of each plaintiff in the corporation at 25% and ordered the accounting. Defendants have appealed.

In 1941 Max Schmetter operated a gas station at 55th Street and Millard Avenue in Chicago. Philip and George Slan at the time were doing business as the American Petroleum Company, selling gas and oil at wholesale, and supplied gas and oil for Schmetter's station. Defendant Albert Johnson was at the time a large operator in the gas and oil business, having fifteen stations, retail and bulk, and an interest in six other related businesses. In April, 1941, Johnson took over Schmetter's station. Plaintiffs sued in 1951, claiming that Johnson took over the station pursuant to an oral agreement under which he was to operate the station through defendant High-Low Corporation and issue the plaintiffs and himself each 25% stock interests. They allege he broke

the agreement and they demand the stock and an accounting.

The decree finds that plaintiffs and Albert Johnson made the alleged oral agreement on or about April 1, 1941; that Johnson breached the agreement; that each plaintiff was entitled to 25% of the "stock, property, assets and business" of High-Low; and that plaintiffs were entitled to an accounting of the business operations since April, 1941. It ordered the cancellation of the High-Low stock held by defendants Albert and Edwin Johnson and the issuance of the stock 25% to each plaintiff and 25% to Albert or Edwin Johnson or both.

In lieu of a master's report, the Chancellor, under a stipulation of the parties, considered the testimony and exhibits as though introduced before him "in the first instance." The decree rests upon the record thus considered. The parties in this court dispute the proper interpretation of the stipulation. The point of dispute is whether or not under the stipulation we are bound by the rule that the Chancellor's findings will not be disturbed unless manifestly against the weight of the evidence. The dispute becomes academic in our view of the evidence. In considering this appeal we are in as good a position to judge the testimony as the Chancellor was, and we shall consider the entire record in making our decision.

Defendants contend that the evidence does not sustain the oral agreement nor the decree's disposition of the subject-matter of the issues and that the action should

and the other two are the same as the first two, but the third is different.

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be barred by reason of laches.

The testimony for plaintiffs is that on April 1, 1941, Schmetter owed the Slans \$2,652.63 for merchandise, owed George Slan, personally, \$800, and owed Rose Leftwich, Schmetter's sister-in-law, \$1,000; that a conference was had on that day between Albert Johnson and plaintiffs in which the Slans agreed to cancel the debts due them and pay off Rose Leftwich, Schmetter to turn over the gas station, and Johnson to organize a corporation to operate the station and to have issued to each of the conferees 25% of the stock; that plaintiffs performed under the agreement, High-Low was formed, and Schmetter's station was wrecked and a new one built by Johnson; that subsequently plaintiffs were instrumental in procuring an agreement for a warranty deed by which the land under the station was to be conveyed to Johnson; that the land was conveyed and paid for out of the station's earnings and conveyed by Johnson to High-Low; and that though plaintiffs often demanded the High-Low stock, Johnson refused to cause its issuance.

Johnson denied any such oral agreement and said his only agreement was to see that Schmetter's indebtedness to the Slans would be paid if the station's operation was successful. This testimony does not explain the undisputed transactions, in which George Slan cancelled Schmetter's \$800 personal debt, Philip Slan, on behalf of George and himself, paid Schmetter's debt of \$1,000 to Rose Leftwich, and Schmetter's equity in the gas station was turned over to Johnson.

There is no dispute that early in May, 1941, Philip Slan applied to the Secretary of State for a charter for a corporation, using as an incorporator the name of his sister, Johnson's wife. This, according to plaintiffs' testimony, was pursuant to their agreement with Johnson, with his wife's name being used at his request. Johnson testified that he was "very sure" his wife did not sign as an incorporator. His wife did not deny signing the application for the charter. Johnson's version of the agreement does not explain Philip Slan's application, and Johnson's testimony with respect to his wife's signature is not impressive.

Defendants argue in this court that Johnson was a "large operator of great experience, possessed of better than average business sense" and that therefore it is inherently improbable that he would make an agreement whereby he received only 25% for his efforts. One probability is that being a better than average business man with a wholesale gas and oil business and several other stations, he saw an opportunity to acquire another outlet for his wholesale business and an addition to his chain of stations. Another probability is one in which there is added to the foregoing an altruistic and sentimental motive arising from Johnson's relationship with the plaintiffs. Philip and George Slan are brothers, Schmetter is married to George Slan's sister-in-law, and defendant Albert Johnson is married to a sister of the Slans. Johnson's testimony with respect to his lack of acquaintance with Schmetter is unconvincing.

Another argument made in support of the claim of the inherent improbability of plaintiffs' version is the failure of plaintiffs to procure any memorandum of the agreement. The relationship of the parties and Johnson's business standing could explain this fact. The same is true with respect to the failure of plaintiffs to write a letter confirming the agreement or to make written demand for performance. Plaintiffs might have been careful to avoid a family disturbance or might have feared that if they pressed Johnson they might incur his displeasure and consequent indifference to their interests. Their testimony indicates that they depended upon him and this could explain why they did not seek to be directors or officers nor expect notice of meetings.

A book entry of \$2,000 was carried on the High-Low books as an indebtedness to the "Slans brothers." Plaintiffs say this was for inventory and equipment delivered to Johnson after the agreement was made. Defendants insist it was the "\$2,652.63" indebtedness which Schmetter owed the Slans and was never cancelled by them, but was to be paid by Johnson should the station succeed under his management. The testimony for plaintiffs was that Schmetter wanted Johnson to pay the value of the inventory to the Slans so that they could pay off the balance of an F.H.A. loan on the station. Since the Slans were paying off other loans of Schmetter, the arrangement does not seem improbable.

The plaintiffs testified that gasoline, oil, air compressors and other materials were inventoried during the

transfer to Johnson and that the value of the inventory was placed at \$2,000 and was not part of the consideration moving to Johnson, but was to be paid by High-Low. Their testimony is that this material was either used at the Schmetter station or trucked to other Johnson stations. Johnson testified that he ordered whatever was on the premises "taken off" because he wanted "no part of anything connected with Schmetter." It is likely that there was inventory on hand at the time of the transaction, and there was introduced a receipt of April 28, 1941, made by an employee of Johnson for 212 gallons of gasoline taken from the station. We think the probabilities on this issue are in favor of plaintiffs.

We have considered the principal factual issues argued by defendants. The testimony of plaintiffs is not clear-cut and precise with respect to these issues, but they were testifying nearly 15 years after the event, and the relationship of the parties to the agreement lent itself to informality and generality. It is true that important supporting documents were not produced by plaintiffs, but the testimony of the three plaintiffs is corroborated by their witness Geller and in some respects by documentary evidence. This testimony is met mainly by the denials of Johnson. We have discussed defendants' contention based upon the "inherent improbabilities" in plaintiffs' case. In our opinion plaintiffs are justified in pointing to the "inherent improbabilities" in defendants' case. It is our opinion that the evidence sustains the oral agreement and the provisions of the decree.

The decree found against defendants on the affirmative defense of laches. This finding was based upon a specific finding that Johnson "from April 1941 to immediately prior to the filing of this suit, repeatedly promised the plaintiffs to account." On the whole record, we think the evidence and its reasonable inferences preponderate in favor of a finding that plaintiffs, up to within a couple of weeks of the filing of this suit, repeatedly asked Johnson to perform, and that Johnson repeatedly made excuses, for not performing, in such a way as to amount to promises to perform. The promises were enough to overcome the defense either of laches or of the statute of limitations at law and we think, for the reasons of relationship and prudence, plaintiffs could not press Johnson and would not do so until they were sure of his intention to repudiate his agreement.

from 6/24/57

It is our conclusion that the Chancellor correctly decided the issues for plaintiffs.

We have considered all points made and hereby affirm the decree.

AFFIRMED.

FEINBERG, P.J. CONCURS.

LEWE, J., TOOK NO PART.

The decree found against defendants on the affirmative defense of laches. This finding was based upon a specific finding that Johnson "from April 1941 to immediately prior to the filing of this suit, repeatedly promised the plaintiffs to account." There is evidence by plaintiffs in support of the finding that their repeated requests of Johnson for performance resulted in his repeated promises to perform. We think it is likely that once the agreement was made, plaintiffs did frequently ask Johnson to carry out the agreement. The promises were enough to overcome the defense of laches and we think, for the reasons of relationship and prudence, plaintiffs could not press Johnson and would not do so until they were sure of his intention to repudiate his agreement.

It is our conclusion that the Chancellor correctly decided the issues for plaintiffs.

We have considered all points made and hereby affirm the decree.

AFFIRMED.

FEINBERG, P.J., CONCURS.

LEWE, J., TOOK NO PART.

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47112

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

JOHN F. BUSER,

Plaintiff in Error.

14 I.A.^{2d} 112
ERROR TO MUNICIPAL
COURT OF CHICAGO.

JUDGE McCORMICK DELIVERED THE OPINION OF THE COURT.

John F. Buser, the defendant in this case, was convicted in the Municipal Court of Chicago on a charge of contributing to the delinquency of a minor in violation of paragraph 104, chapter 38, Illinois Revised Statutes of 1955, and sentenced to one year in the house of correction in the City of Chicago. The case is brought before us by writ of error.

The only question here presented is whether the information filed against the defendant was sufficient in law to charge him with the commission of the offense therein alleged. The pertinent part of the information is that "John F. Buser, heretofore, to-wit, on the 9th day of April, 1956, at the City of Chicago, County of Cook, aforesaid, did unlawfully, knowingly and wilfully encourage Carla Fisher, a female person under the age of 18 years, to-wit: 16 years, of age, to be or to become a delinquent child and did then and there unlawfully, knowingly and wilfully do acts which directly produced, promoted and contributed to conditions which tended to render said Carla Fisher to be or to become a delinquent

11.11.11

Dear Sir,

I have the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the above matter.

I am sorry to hear that you are having trouble with your machine. I will be glad to help you in any way I can.

Yours faithfully,

J. H. Smith

11.11.11

child in that he, the said John F. Buser bought food, drinks, and intoxicants, also that said John Buser had rented a room in the Planters Hotel, at 19 N. Clark St. where he stayed with the said Carla Fisher paying the sum of Five Dollars and fifty cents for said room," in violation of the statute.

The statute on which the information is based is paragraph 104 of chapter 38 of the Illinois Revised Statutes of 1955, which provides:

"Any person who shall knowingly or wilfully cause, aid or encourage * * * any female under the age of eighteen(18) years to be or to become a delinquent child as defined in section one (1), or who shall knowingly or wilfully do acts which directly tend to render any such child so delinquent * * * shall be deemed guilty of the crime of contributing to the delinquency of children * * *."

In the preceding section (par. 103) a delinquent child is defined.

No motion was made by the defendant to quash the information. In order to find a defendant guilty of the offense of contributing to the delinquency of a child it is not necessary that the child be found to be delinquent under the terms of the statute. The essential purpose of the law when it prohibits the doing of acts which would have a tendency to create subsequent delinquency is that of prevention. People v. Raddatz, 403 Ill. 48. The court has held that an information stating an offense in the language of the statute is valid. "It is the general rule that it is sufficient to state the offense in the language of the statute, where the act clearly defines the

offense, or if the defendant is so notified of the charge as to be able to prepare his defense and the jury can understand the offense and the court pass sentence upon the conviction." People v. Johnson, 392 Ill. 409.

Here the offense as defined by the statute was properly stated in the information when it alleged that the defendant unlawfully, knowingly and wilfully did acts directly producing, promoting and contributing to conditions which tended to cause Carla Fisher to be or become a delinquent child. The information clearly notified the defendant of the charges against him. While the specific acts done by the defendant as set out in the information were defectively stated, the information sufficiently alleged the commission of a crime. People v. Melville, 185 Ill. App. 214; People v. Wallace, 185 Ill. App. 213. Since a crime was properly charged and the court had jurisdiction of the subject matter, an attack on the allegations of an information because they are not sufficiently specific should be taken advantage of by a motion to quash. People v. Johnson, supra.

The defendant also urges that he was not furnished with a copy of the information filed against him. The defendant cannot in a court of review make an issue of the fact that he was not furnished with a copy of the information in a proceeding in the Municipal Court of Chicago unless he makes a showing that he made a request for the same. People v. Wilson, 304 Ill. App. 255. No such request was made in this case.

The judgment of the Municipal Court of Chicago is affirmed.

Judgment affirmed.

Robson, P. J., and Schwartz, J., concur.

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47033

IN THE MATTER OF THE ESTATE OF
JAMES READY, DECEASED

ALICE MARGUERITE READY, et al.,

Appellants,

v.

JOHN E. CORRIGAN, Executor of the
Estate of JAMES READY, Deceased,

Appellee.

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14 I.A.^{2d} 113

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

JUDGE KILEY DELIVERED THE OPINION OF THE COURT.

This appeal is from an order admitting to probate the alleged will of James Ready.

John E. Corrigan, executor under the will, is the proponent. Contestants are Alice M. Ready and Marion P. Zacharia, remaindermen under the trust set up in the will. At the hearing in the Probate Court their counsel was given opportunity to cross-examine the attesting witnesses, Frances and Axel Person. That court ordered the will admitted to probate. From that order contestants appealed to the Circuit Court which, after trial de novo, also ordered the will admitted to probate. That order is the subject of this appeal.

The only errors claimed by contestants are that the court improperly made Mrs. Person its witness of its own motion, and permitted leading and suggestive questions to be asked of both witnesses. The order is amply supported by the record so that we cannot presume it is the result of prejudice arising from the alleged errors. And the alleged

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errors are not sufficient in themselves to warrant reversal for unfairness in the trial. Appellants have failed to sustain their burden of showing this court that the alleged errors were harmful. They suggest that had the court not made the alleged errors the result at the trial might have been different. They do not say in what respect.

Section 69 of the Probate Act (Ill. Rev. Stat. 1955, chap. 3, par. 221) provides:

"When each of two attesting witnesses to a will testifies before the probate court (a) that he was present and saw the testator * * * sign the will in the presence of the witness * * * (b) that the will was attested by the witness in the presence of the testator, and (c) that he believed the testator to be of sound mind and memory at the time of signing or acknowledging the will, the execution of the will is sufficiently proved to admit it to probate unless there is proof of fraud, forgery, compulsion, or other improper conduct which in the opinion of the probate court is deemed sufficient to invalidate or destroy the will. * * * If the proponent establishes the will by sufficient competent evidence it shall be admitted to probate unless there is proof of fraud, forgery, compulsion, or other improper conduct which in the opinion of the court is deemed sufficient to invalidate or destroy the will."

Proponents made a prima facie case when they introduced without objection an authenticated transcript of testimony taken in the Probate Court, In re Estate of Walsh, 400 Ill. 454, 459. That testimony established in the Circuit Court each of the elements required by the statute. The attesting witnesses nevertheless testified, and contestants made no showing, on cross-examination or by offering their own witnesses, of "fraud, forgery, compulsion, or other improper conduct." For these reasons, even assuming but not

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11. ALBERT ROY, born 11 August 1901.

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deciding that the testimony adduced by the leading questions should be disregarded, the trial court was entitled to decide that the proponent's prima facie case was not overcome, and to find for proponent.

AFFIRMED.

FEINBERG, P.J. CONCURS.

LEWE, J., TOOK NO PART.

47002

SADIE B. STAFFORD,

Appellant,

v.

CITY OF CHICAGO, a Municipal
corporation,

Appellee.

14 I.A.^{2d} 114

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE FEINBERG DELIVERED THE OPINION OF THE
COURT.

Plaintiff sought to recover damages for personal injuries resulting from her fall, allegedly caused by a defective condition of the sidewalk in question. There was a trial with a jury, resulting in a verdict of not guilty and judgment entered upon the verdict.

Plaintiff, upon this appeal, complains of prejudicial conduct of counsel for defendant in the presence of the jury, which induced the verdict. In the view we take of this record, we deem it necessary only to point to the prejudicial conduct of counsel for defendant, which calls for a reversal of the judgment.

The record discloses that plaintiff's attending physician testified to the injuries of plaintiff and the medical treatment extended to her. He did not testify as to how the accident happened or what the plaintiff had related to him concerning it. On cross-examination defendant's counsel asked the witness to read from a document marked defendant's exhibit 1 for identification, which had not been tendered or received in evidence upon

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the trial. The exhibit was a medical report by the doctor to plaintiff's lawyer, concerning plaintiff's condition. Over the definite objection of counsel for plaintiff, the court allowed defendant's counsel to ask the witness to read from the report, and the witness read: "The above patient stated she was injured about 5:15 March 1, 1950," and said that the words in the report "while crossing the street" were crossed out. The court permitted defendant to ask further questions about the preparation of the report and as to who crossed out the words referred to. The witness stated that he did not recall whether he crossed out the words or whether somebody else did it; and that they were typed in by a girl in the office. The witness had not, upon direct examination, made any reference to the nature of the accident. The cross-examination was highly improper and prejudicial. Defendant's counsel improperly succeeded in getting before the jury an inference that plaintiff was injured while crossing the street instead of while walking on the sidewalk. Gordon v. Checker Taxi Co., 334 Ill. App. 313. The report itself was not competent in evidence nor were its contents upon cross-examination relevant. People ✓ v. White, 8 Ill. App. 2d 428. The report of the witness, made to the lawyer in preparation for trial, is a privileged communication under Rule 19-5 of the Supreme Court (Ill. Rev. Stat. 1955, Ch. 110, §101.19-5), which provides:

"All matters which are privileged against disclosure upon the trial are privileged against disclosure through any discovery procedure. Disclosure of

memoranda, reports or documents made by or for a party in preparation for trial or any privileged communications between any party or his agent and the attorney for the party shall not be required through any discovery procedure."

On direct examination of defendant's witness Harris, the record discloses the following:

"Mr. Lowinger: Your Honor, I plead surprise, because this witness under oath testified contrary at a previous time, and I move the Court's permission at this time to examine this witness as under cross examination.

"The Court: You certainly can."

There was objection made to the statement of counsel and the procedure allowed by the court. If counsel for defendant in reality was surprised by the answers of his own witness, the foregoing statement should not have been made in the presence of the jury. She may or may not have testified contrary at a previous trial. It depended upon proof to be made on that question, but until proof was made counsel had no right to deprive plaintiff of the benefit of any favorable testimony by this witness, by making the statement in the presence of the jury. The proper practice is to first make a showing to the court of the surprise, out of the presence of the jury. To impeach the witness Harris, a court reporter, who took her testimony upon a previous trial, was called to read from his notes. Upon the conclusion of his testimony the following occurred:

"Mr. Lowinger: Your Honor, it is our understanding that when a witness testifies in contradiction under oath two times, they are subject to a perjury citation; and I would like to ask the Court if he will consider Mrs. Harris--

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"The Court: I don't want any statement made of any character with reference to that. I want you to proceed with any more witnesses."

This was an inflammatory statement, made in the presence of the jury, which assumed the witness Harris, who supposedly surprised defendant's counsel by giving answers favorable to plaintiff's cause, was guilty of perjury. No ruling of the court could have removed the prejudicial effect of counsel's statement. Bale v. Chicago Junction Ry. Co., 259 Ill. 476; Bishop v. Chicago Junction Ry. Co., 289 Ill. 63, 70. In Wellner v. New York Life Ins. Co., 331 Ill. App. 360, 365, this court said:

"The defendant is entitled to a fair trial, free from prejudicial conduct of counsel, who in an argument undertakes to supply facts, or an inference favorable to the plaintiff not based upon any evidence in the record."

In Gordon v. Checker Taxi Co., supra, this court said:

"We cannot place our stamp of approval upon such trial practice. It does not result in a fair trial according to settled standards, and a verdict so obtained should not be permitted to stand."

Other questions raised we need not consider.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

KILEY, J., CONCURS.

LEWE, J., TOOK NO PART.

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the following statement, made in the presence of the two witness jurors, who were asked to ask the defendant questions by giving answers to the questions asked by the witness jurors.

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14 I.A.^{2nd} 115

APPELLATE COURT OF ILLINOIS

PAUL V. WUNDER
Clerk Appellate Court Second District

FEBRUARY TERM, A. D. 1957

Plaintiff-Appellee,

BREGSTONE'S, INC., a Corporation,

Defendant-Appellant,

And FIRST NATIONAL BANK OF CHICAGO, as Trustee under Trust Agreement No. 33464,

Defendant.

Appeal from the
Circuit Court of
Rock Island County

EOVALDI, --- J.

This is an appeal by Bregstone's, Inc. from a judgment rendered on a verdict of \$30,000 in favor of plaintiff against both defendants.

Plaintiff's injuries were incurred when he stepped into a freight elevator shaft on premises leased by Bregstone's from the First National Bank of Chicago. At the

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time of the accident plaintiff was an employee of a third party and an invitee on the premises.

The trial court denied the separate motions of defendants for directed verdicts at the close of plaintiff's evidence. No evidence was offered on behalf of the defendants. The court reserved ruling on the separate motions of both defendants for directed verdicts at the close of all the evidence. Final arguments were made, and the jury returned its verdict.

On the 11th of March, 1955 the court entered judgment on the verdict against both defendants. On March 18, 1955 separate motions for judgment notwithstanding the verdict, and in the alternative separate motions for new trial, were filed by both defendants. Some seventeen months later, and on August 13, 1956, the trial court allowed the motions of the defendant, First National Bank of Chicago, for directed verdict and for judgment notwithstanding the verdict, and entered judgment in the Bank's favor against plaintiff for costs; and denied the motions of defendant, Bregstone's.

Plaintiff has filed no appeal from the judgment notwithstanding the verdict in favor of the Bank.

The defendant's theory is that plaintiff was guilty of contributory negligence as a matter of law and that the trial judge should have directed a verdict in favor of the defendant; that plaintiff failed to prove negligence on the part of the defendant, and that the verdict is

against the manifest weight of the evidence and contrary to the law; and that a joint judgment invalid as to one defendant is invalid as to all defendants where it would be prejudicial to leave such judgment stand.

Plaintiff was a temporary employee of Schafer's Express Company, which company picked up and delivered merchandise for Bregstone's on a contractual arrangement. On the day of the accident, November 3, 1952, at about 4:30 p.m., plaintiff, together with another employee of Schafer's, parked their truck in the alley at the elevator entrance of Bregstone's. Plaintiff was familiar with the Bregstone premises. He had called on Bregstone's to pick up or deliver merchandise three or four times a week, sometimes twice a day for two months. He knew others used the elevator besides himself and Schafer. He knew the only way to lock the hoistway door was from the inside with pins that go into the frame work. Plaintiff, regularly employed, was a machinist for International Harvester Company and had taken the temporary job with Schafer's pending settlement of a strike at International Harvester. He had been on the new job for about two months.

Bregstone's was engaged in the business of selling furniture, appliances and miscellaneous. The building in which it operated was leased from the First National Bank of Chicago at the time of the accident and for seven years prior thereto. The building consisted of three stories in front and two stories and basement in the rear, fronting South on

and he invited us to all celebrations which it would be proper to attend in connection with the celebration.

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Second Avenue and North on an alley in the rear.

A freight elevator is located in the Northwest corner of the building on the alley. This elevator has an opening to the alley and an opening to a receiving or shipping room in the building, and is used to move merchandise from floor to floor and in and out of the building. In addition to the elevator entrance to the alley, there is a regular doorway entrance from the receiving room to the alley.

The written lease was not presented in evidence, but Daniel Bregstone, president and manager of the defendant corporation, testified that Bregstone's had the duty under its lease to operate, maintain and make necessary repairs, alterations and installations on its elevator and elevator shaft for the purpose of maintaining the elevator and elevator shaft.

The elevator itself has no doors. The entrance-way from the elevator to the alley is enclosed on the outside by a solid wooden door which raises vertically when manually lifted. Immediately inside this door is another door or lattice safety gate which likewise raises vertically when manually lifted. This lattice gate is designed with a counterweight pulley arrangement so that when raised with the elevator present it attaches itself to a device on the elevator and remains open. When the elevator is moved, the gate drops enclosing the elevator shaft. This lattice safety gate will not remain in an up position when the elevator is not present since

the counterweights will force it down and keep it down unless it is attached to the holding device on the elevator.

The outside wooden hoistway door works independently of the elevator. It has no connection with the elevator and may remain open or closed when the elevator is in use. It may be locked from the inside by manually operated sliding bolts. It was kept locked at night but not always during the daytime.

The entrance from the elevator to the receiving or shipping room is enclosed by another lattice safety gate identical in appearance and operation with the gate on the alley entrance.

Both entrances are about 6 feet wide and 7 feet high. At the elevator entrance on the alley there is a loading platform about 6 feet long and 3 feet wide. The receiving room is 24 feet by 10 feet, and it runs parallel with the alley. There is no artificial light in the elevator shaft. However, directly over the elevator entrance to the alley there is a large window approximately five feet by 6 feet. As shown in the exhibits, there is another window directly under the elevator entrance opening into the elevator shaft. In addition, the receiving room contains three large windows on the alley wall each about 3 by 5 feet.

The elevator and shaft were serviced bi-monthly by Montgomery Elevator Company under a contract with Bregstone's. The last examination preceding the accident was made on October 3, 1952, one month before the accident. The

the measurements all show a decrease in size as the distance from the center of the galaxy increases.

The observed rotation velocity of the stars in the spiral arms of the galaxy is not constant, but decreases as the distance from the center increases. This is in accordance with the expectation that the mass of the galaxy is concentrated in the central region, and that the stars in the outer regions are moving in orbits around a central mass.

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examining serviceman for Montgomery testified at length as to his method of examination. He stated that all of the elevator equipment was in good working order, and, specifically that he tested the lattice safety gates, that he found they worked as they should, that the holding devices on the elevator designed to hold up the gates were not worn and operated properly.

The elevator did not have an interlock system, which system prevents the opening of a door when the elevator is not present. The serviceman stated that all new construction of the elevators makes use of the interlock system; that, of the old elevators he examines, about one-half have been remodelled to include the interlock system.

Mr. Bregstone testified that he was not aware of the interlock system either at the time he rented the building or at the time of the accident. Over objection by counsel for defendants, he stated he now knew of such system and that its cost of installation was approximately \$1,000.00

The plaintiff was the only witness to the accident itself and he further testified as follows: He and his fellow worker, Jack Schafer, approached Bregstone's at 4:30 in the afternoon to pick up some merchandise. Plaintiff, after opening the side doors on the truck, stayed on the truck while Schafer pulled it up close to the elevator entrance loading platform. While Schafer used the other door to the receiving room, plaintiff proceeded to open the elevator

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entrance doors, stating:

"Q. What happened on that particular occasion? What did you do?

A. I threw the wooden door up, then grabbed hold of the lattice gate and threw that up. I got it up about shoulder high, went to turn under it to see if it was going to catch in the teeth, and at that time I stepped off.

Q. Where did you step?

A. Down the elevator shaft."

The elevator was not at the platform but was upstairs. Plaintiff fell to the basement. On the other occasions he had been there, he testified that the elevator was always there because he always walked right in; that on one occasion the lattice gate came down on his forehead and broke his skin, and there were different times after he had been hit that he would watch to see if it would catch in the teeth up there; that sometimes it would catch, and sometimes he had to jiggle it a little to make it stick in there.

It is the jury's function to determine the facts, disputed as well as undisputed, and to make reasonable inferences therefrom. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29; *Lavender v. Kurn*, 327 U. S. 645; *Lindroth v. Walgreen Co.*, 407 Ill. 121, 133, 135; *Bonnier v. C. B. & Q. R. R. Co.*, 2 Ill. 2d 606, 611, 613; *Beverly v. Central Illinois Elec. & Gas Co.*, 5 Ill. App. 2d 27, 36; *Allendorf v. E. J. & E. Ry. Co.*, 8 Ill. 2d 164, 171. We cannot say as

The evidence was not in the form of a report, but in the form of a letter. It was a letter from the person who had been told to go to the basement. In this letter, the person told me that he had seen the person who had been told to go to the basement. He also told me that he had seen the person who had been told to go to the basement. He also told me that he had seen the person who had been told to go to the basement.

1. The first step in the process of identifying a problem is to define the problem. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes. Once the causes have been identified, the next step is to develop a plan of action. This involves identifying the steps that need to be taken to solve the problem and determining the resources that will be needed to implement the plan. Finally, the last step in the process is to implement the plan and monitor the results. This involves putting the plan into action and tracking the progress of the solution. Once the problem has been solved, the final step is to evaluate the results and determine if the solution was effective. This involves comparing the results of the solution to the original problem and determining if the problem has been solved. If the problem has not been solved, the process may need to be repeated.

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

a matter of law that the verdict was not properly supported by the evidence. The record, in our opinion, contains sufficient evidence to establish a reasonable basis from which the jury could conclude that defendant was guilty of the negligence charged, and in that state of the record we would not be justified in substituting our conclusions for those of the jury. *Beverly v. Central Illinois Elec. & Gas Co.*, supra.

The defendant's contention that the plaintiff was guilty of contributory negligence as a matter of law is untenable. The question of contributory negligence is ordinarily one of fact for the jury to decide under proper instructions. Contributory negligence becomes a question of law only when it can properly be said that all reasonable minds would reach the conclusion, under the facts stated, that such facts did not establish due care and caution on the part of the person charged therewith. *Thomas v. Buchanan*, 357 Ill. 270, 277; *Markus v. Lake County Ready-Mix Co.*, 6 Ill. App 2d 420. In the instant case there was sufficient evidence in the record to go to the jury upon the issue as to whether the plaintiff, at the time of the incident in question, was in the exercise of ordinary care and caution for his own safety.

As to defendant's contention that the verdict is against the manifest weight of the evidence, it is not the province of this court to substitute its judgment for that of the jury, or to upset the verdict even if it were to reach a contrary conclusion, for that would be invading the constitu-

[illegible]

tional prerogative of the jury. *Bliss v. Knapp*, 331 Ill. App. 45, 50. To be against the "manifest weight of the evidence" requires that an opposite conclusion be clearly evident. *Olin Industries, Inc. v. Wuellner*, 1 Ill. App. 2d 267, 271; *Schneiderman v. Interstate Transit Lines, Inc.*, 331 Ill. App. 143, 147. We cannot say that the judgment is against the manifest weight of the evidence in this case.

On motion for judgment notwithstanding the verdict, or for a directed verdict, the court does not weigh the evidence. The court may properly consider only the evidence and inferences most favorable to the plaintiff; and it is only where there is no evidence tending to prove plaintiff's case that the court can grant either a motion for directed verdict, or judgment notwithstanding the verdict. *Lindroth v. Walgreen Co.*, supra, 130; *Beverly v. Central Illinois Elec. & Gas Co.*, supra. The trial court may only grant judgment notwithstanding the verdict if, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiff, there is a total failure or lack of evidence to prove any necessary element of plaintiff's case. *Heideman v. Kelsey*, 414 Ill. 453, 457; *Hall v. C. & N. W. Ry. Co.*, 5 Ill. 2d 135, 140. In this case there was evidence to support the finding of the jury and the trial court properly refused to grant the motion for judgment notwithstanding the verdict.

[illegible]

Under the arbitrary and inflexible character of the common-law unit-judgment rule, it has been held in this State that a judgment against two or more defendants, whether in contract or tort, was indivisible, and could neither be vacated by a trial court nor reversed by a reviewing court as to one defendant alone, even though it was not erroneous as to the others.

Since the adoption of the Civil Practice Act, it has been held that when a judgment against two or more defendants is vacated as to one of them, it need not for that reason alone be vacated as to any of the others; yet, if special factors appear in the case which would make it prejudicial to leave the judgment standing against one defendant after being vacated as to another, this court should not hesitate to order a new trial.

Both parties cite, and rely on, *Chmielewski v. Marich*, 2 Ill. 2d 568. Each case must depend on its own particular facts. As stated in *White v. Seitz*, 342 Ill. 266 at 270: "A judicial opinion, however, like a judgment, must be read as applicable only to the facts involved and is an authority only for what is actually decided." *Moore v. Daydif*, 7 Ill. App. 2d 534.

In his closing argument to the jury, without objection by defendants, plaintiff's counsel made the following improper remarks: "* * * This is a pretty serious case to us;

When the witnesses and defendant appeared at the
court-house on the morning of the 10th of June, the
case was called on by the court, and the
prosecution called the first witness, who was
examined and cross-examined, and then called the
second witness, who was also examined and cross-examined,
and then the defendant called his witnesses, who were
examined and cross-examined, and then the case was
closed.

The jury then retired to the jury room, and
after about half an hour, they returned, and
announced their verdict, which was that the
defendant was guilty of the crime charged.
The court then sentenced the defendant to
imprisonment for a term of years, and the
case was closed.

The court then adjourned until the next
day, and the case was called on again, and
the prosecution called the third witness, who
was examined and cross-examined, and then
the defendant called his witnesses, who were
examined and cross-examined, and then the
case was closed.

The jury then retired to the jury room, and
after about half an hour, they returned, and
announced their verdict, which was that the
defendant was guilty of the crime charged.
The court then sentenced the defendant to
imprisonment for a term of years, and the
case was closed.

it is a pretty serious case to Mr. Smith; and I would think it would be a pretty serious case to both defendants, but it does not seem to be serious enough for any representative of the Bank to even take the time to be present here in court and listen to this case.* * *.

In the face of the long established and fundamental principle that a landlord is not liable to the invitee of a lessee for a defective condition of the premises unless such condition was latent, actually known by the landlord and concealed from the lessee, the court refused to direct a verdict in favor of the defendant Bank, but allowed it to remain in the case. Many months later the court recognized the principle involved and set aside the verdict as to the Bank and entered judgment in its favor. What effect leaving the Bank in the case may have had on the jury during its deliberations in which it was permitted to make a finding not only as to defendant Bregstone's but also as to defendant First National Bank of Chicago, and what effect it may have had on the jury in assessing damages in this case is impossible for us to say. In the state of the record and under the law clearly applicable thereto, Bregstone's was not given the trial it was entitled to. The jury was permitted to return its verdict against both defendants under the mistaken belief that it was up to the jury to determine the guilt of the Bank.

[illegible]

For the error of the trial court in denying defendant Bregstone's motion for a new trial, the cause is reversed and remanded for a new trial.

Reversed and remanded.

*Crow
Concurs*

Dove, P. J. Concurs

For the purpose of the study, the data was collected from the following sources:

Interviews with the participants, and the data was collected from the following sources:

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Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

February Term, A. D. 1957.

14 I.A.^{2d} 126

General No. 10110

Agenda No. 9

Charles Wiese, Arthur Wiese
and C. R. Welton,

Plaintiffs-Appellees,

vs.

Ivan F. Mieher and Fred C.
Mieher,

Defendants-Appellants.

Appeal from
Circuit Court of
Macoupin County.

REYNOLDS, P. J.

This cause arises out of a dispute over the drainage of surface waters of the north half of an eighty acre tract, owned by the defendants, Fred Mieher and Ivan Mieher. The tract was owned by the Hayes family for about 35 years, and in 1954 it was sold to the defendants. The tract consists of two forty acre tracts, which for the purpose of this opinion will be designated the "north forty" and the "south forty". There is no dispute as to the drainage of the south forty and the dispute arose when the defendants cut or deepened

Abstract

STATE OF ILLINOIS
COURT OF COMMON PLEAS
JAMES M. HARRIS

14 1A.136

February 2nd, A. D. 1915.

James M. Harris

James M. Harris

James M. Harris
Circuit Court of
Cook County.

James M. Harris, Plaintiff,
vs.
James M. Harris, Defendant.

RETURNED, P. D.
This cause arises out of a dispute over the ownership of
certain real estate in Cook County, Illinois, and is
brought by the Plaintiff, James M. Harris, who
claims to be the owner of the same, against the Defendant,
James M. Harris, who claims to be the owner of the same.
The Plaintiff claims that he is the owner of the same
and that the Defendant is not the owner of the same.
The Defendant claims that he is the owner of the same
and that the Plaintiff is not the owner of the same.
The Court has heard the evidence and finds that the
Plaintiff is the owner of the same and that the
Defendant is not the owner of the same.

a ditch through a natural ridge between the two forty acre tracts, so as to drain the north forty down through the south forty and into the drainage system of the plaintiffs Arthur and Charles Wiese and their neighbors to the south. The eighty acre tract is bounded on the north by a gravel road known as the Palmyra road. There is a drainage ditch on each side of this road. At the north west corner of the tract, the Palmyra road is intersected by another gravel road which runs along the west boundary of the eighty acre tract of the defendants to the south west corner of the tract, then turns eastward and runs along the south side of the tract, so that there is a gravel road on three sides, the north, the west and south. To the east lies the one hundred sixty acre farm on which the defendant Fred Mieher lives. Immediately south of the south forty and south of the gravel road lies the land of Arthur and Charles Wiese, two of the plaintiffs, and immediately south of the eighty acre tract owned by Arthur and Charles Wiese, lies the land of Charles Welton, the other plaintiff. The drainage ditch of these plaintiffs for identification will be called the Wiese-Welton Drainage Ditch. The water in the ditch on the gravel road known as the Palmyra road, flows to the west, to the north west corner of the Mieher eighty acre tract, crosses the road on the west, and then continues in a generally southwesterly direction across the land known as the Nevins farm, which lies immediately

a ditch through a sugarbush thicket between the two forty acre
tracts, so as to drain the north forty down through the south
forty and over the drainage system of the drainage ditch
and Charles street and back north to the ditch. The
ditch runs back is located on the north by a gravel road,
known as the Lally road. There is a drainage ditch on each
side of this road. At the north end corner of the tract,
the Lally road is intersected by another gravel road which
runs along the west boundary of the south forty and of the
ditch to the south west corner of the tract, then turns
eastward and runs along the south side of the tract, so that
there is a gravel road on three sides, the north, the west
and south. To the east line the one hundred sixty acre farm
on which the celebrated Fred Fisher lived. Immediately south
of the south forty and north of the gravel road line the land
of Arthur and Charles street, two of the drainage ditches, and
immediately south of the eighty acre tract owned by Arthur
and Charles street, lies the land of Charles street, the other
drainage ditch. The drainage ditch at these drainage ditches for drainage
fiction will be called the Lally-Fisher drainage ditch. The
water in the ditch on the gravel road flows to the Lally
road, flows to the south, on the north west corner of the
tract eighty acre tract, crosses the road on the west, and
then continues in a drainage ditch immediately adjacent to the
the land known as the Lally tract, which lies immediately

west of the north and south forty of the defendants. To the north across the Palmyra road, there is another eighty acre tract owned by Elbert Nevins, who also owns the land west of the Mieher eighty acre tract, and the drainage of this Nevins farm to the north, and the west is by the drainage ditch which runs along the Palmyra road to the northwest corner of the Mieher eighty acre tract, and thence southwest through the Nevins land. This ditch for identification will be called the Nevins Drainage Ditch. There is a natural ridge across the Mieher tract that is some two or three feet higher than the rest of the land in the north or south forty. Most of the witnesses testified that there was no ditch through this ridge, but one of the defendants claimed that there was an old ditch through there which he cleared out. The plaintiffs brought a suit for a mandatory injunction against the defendants to enjoin them from draining the north forty acres in a southerly direction into and over the lands of the plaintiffs, and to compel the defendants to drain the north forty in a northerly direction and into the drainage ditch alongside the Palmyra road into the Nevins Drainage Ditch. The plaintiffs in their complaint alleged that the drainage of the north forty had been to the north for over sixty years last past and that the natural drainage of this forty acres was to the north. To the complaint the defendants filed their answer, and requested a

[illegible]

trial by jury. This request was denied by the court, and trial was had before the court. The injunction was granted and from that order of injunction the defendants appeal to this court.

The defendants raise two points in their appeal. 1. That a mandatory injunction is an extraordinary remedy and that before such a writ should issue, the rights of the plaintiffs should appear clearly and conclusively; that the evidence did not show any damage to the plaintiffs, and that the chancellor granted the injunction without sufficient evidence as to the facts or as to damage sustained. 2. That the plaintiffs failed to carry the burden of proof.

The plaintiffs offered the evidence of fourteen witnesses, and the defendants offered the evidence of eight witnesses. From the view we take of this case, we do not feel it necessary to outline the testimony of all of the different witnesses. Suffice it to say that the evidence was conflicting on nearly all points.

There does not seem to be too much argument as to the law governing this type of case. As contended by the defendants, the granting of an injunction should be exercised only when the right of the plaintiff to relief has been shown clearly and affirmatively. This is true not only as to mandatory injunctions, but to any injunction. Joseph v. Wieland Dairy Co., 297 Ill. 574; Economy Dairy Co. v. Kerner, 303 Ill.

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App. 259; Hope v. Hope, 350 Ill. App. 190; Stenzel v. Yates, 342 Ill. App. 435; Vulcan Detinning Co. v. St. Clair, 315 Ill. 40. As the court said in the case of Hope v. Hope, 350 Ill. App. 190, at page 194: "The extraordinary character of the injunctive remedy requires that it be awarded only where the complaint shows on its face a clear right to the relief, and the facts relied upon to establish such right must be alleged positively and with certainty and precision." But there is another equally well recognized principle of law which must be considered in any decision in this cause. The courts of Illinois have uniformly held for almost a century, that the owner of a dominant heritage may use land and cultivate it according to the ordinary modes of good husbandry, and although by so doing he may interfere with the natural flow of water passing over his land, so as to increase or diminish the amount that would otherwise reach the land of an adjacent proprietor, and thereby cause him an injury for which the law gives no redress, yet such owner has no right, by the construction of ditches and embankments, or other artificial structures, to collect together the surface water from his own lands or those of other persons, and precipitate them in undue and unnatural quantities upon the land of his neighbor, and if he attempts to do so, a court of equity will interpose to prevent the act. Hicks v. Silliman et al., 93 Ill. 255; Eimers v. C. C. C. & St. L. Ry. Co., 158 Ill. App. 557; Anderson v. Henderson, 124 Ill. 164; Dayton v. Drainage Commissioners, 128 Ill. 271; Mugge v. Erkman, 161 Ill. App. 180. And these same cases all affirm the right of redress by way of injunction. As was said in the Hicks v. Silliman case,

App. 259; Hoge v. Hoge, 350 Ill. App. 197; Stenzel v. Yates,
 342 Ill. App. 432; Valley Packing Co. v. St. Clair, 312 Ill. 40.
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William et al., 93 Ill. 225; Winters v. C. C. & St. L. Ry. Co.,
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where a bill for injunction to prevent a threatened nuisance was filed, the court held that the remedy by injunction was clearly established. The court in that case in commenting on the testimony of witnesses, said: "When certain facts are admitted or proven, the court takes notice, without further proof, of all such presumptions and inferences arising from them as are warranted by uniform experience, and also all such consequences as are known to flow from the laws which govern matter, and which are applicable to the proven or admitted facts." In the case of Winhold v. Finch, 286 Ill. 614, at page 618, the court there said: "It is contended by the appellant that the appellees were not entitled to an injunction because there was no evidence of substantial damage to their land. If the evidence of the appellees, alone, is considered it would sustain findings that their land is capable of farming and cultivation and that crops can be and have been raised on it; that by reason of the obstruction of the water-course a part of the land has been overflowed, even after the diversion of the water from Sand branch, to a depth of a foot or more, and that such condition continued for a longer time than it would have lasted but for the obstruction; that such condition will be repeated from time to time and will reduce the crops which can be raised on the land, and, if it is permanent, the value of the land. It is true that to justify relief by injunction an actual and substantial injury must be shown, as was held in Girard v. Lehigh Stone Co., 280 Ill. 479, and Dunn v. Youmans, 224 Ill. 34, but this does not mean that the injury must necessarily be great in the pecuniary loss involved or

where a bill for injunction to prevent a threatened nuisance was filed, the court held that the remedy by injunction was clearly established. The court in that case is controlling on the testimony of witnesses, said: "When certain facts are established or proven, the court takes notice, without further proof, of all such circumstances and inferences arising therefrom as are warranted by common experience, and also all such consequences as are known to flow from the facts which govern the case, and which are applicable to the proof or disproof of facts. In the case of Wright v. Smith, 255 Ill. 511, at page 514, the court there said: "It is contended by the appellant that the appellants were not entitled to an injunction because there was no evidence of substantial damage to their land. If the evidence of the appellants, alone, is considered it would sustain findings that their land is capable of raising and cultivation and that crops can be and have been raised on it; that by reason of the obstruction of the water-course a part of the land has been overflowed, even after the diversion of the water from the branch, to a depth of a foot or more, and that such condition continued for a longer time than it would have lasted had the obstruction; that such condition will be repeated from time to time and will reduce the crops which can be raised on the land, and, if it is permanent, the value of the land. It is true that to justify relief by injunction an actual and substantial injury must be shown, as was held in Wright v. Smith, 255 Ill. 511, 512, and Wright v. Towns, 255 Ill. 511, 512, but this does not mean that the injury must necessarily be great in the pecuniary loss involved or

impossible of compensation in damages. When an owner of property is about to be deprived of a legal right in connection with it by the wrongful act of another for which there is no legal redress the act may be restrained by injunction, or, if it has already been executed, may be required to be undone, if this is practicable. The irreparable injury necessary to give a court of equity jurisdiction in such a case is not one so great as to be impossible of compensation, but one of such a character that the law cannot give adequate compensation for it. 'The fact that no actual damages can be proved, so that in an action at law the jury could award nominal damages, only, often furnishes the very best reason why a court of equity should interfere in a case where a nuisance is a continuous one.' (Elliott on Roads and Streets, 497; Newell v. Sass, 142 Ill. 104.)"

While the Winhold case is one of a blocked watercourse, and this is one of an alleged ditch, the principles enunciated are applicable. If, as alleged, the defendants by the digging of the ditch through or across the high ground of the eighty acre tract, changed the flow of the surface waters of the north forty, and allowed the water from the north forty and that of the land lying east of the eighty acre tract, to flow into the ditch of the plaintiffs, thereby threatening to drown out their crops or diminish the value of their land, then the right of injunction is clearly established and is the proper remedy.

The evidence is conflicting. There is sharp conflict as to the existence of the ditch, through the high ground in the center

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 the value of their land, then the right of injunction is clearly
 established and is the proper remedy.
 The evidence is conflicting. There is some conflict as to
 the existence of the ditch, through the high ground in the center

of the tract. Nearly all of the witnesses for the plaintiffs testified that there was no ditch prior to the purchase by the defendants. Some of the witnesses for the defendants testified that the ditch had been there for many years. There is conflict in the testimony as to the slope of the north forty. There is also conflict as to the drainage afforded by the highway ditches to the north. All these are questions of fact that were decided by the chancellor. We cannot agree with the contention of the defendants that the decision of the chancellor was without sufficient evidence as to the facts or as to damage sustained or likely to be sustained, nor do we believe that the injunction in this cause was entered to satisfy the whim of a plaintiff. While the evidence is in conflict on many points, there is sufficient evidence in the record to entitle the chancellor to use his discretion as to the granting of the writ of injunction. Since the greater number of witnesses support the position of the plaintiff, we do not feel warranted in disturbing the findings of the court whose province it was to determine upon which side was the greater weight of the evidence. The decree of the Circuit Court will be affirmed.

Affirmed.

of the road. Nearly all of the witnesses for the plaintiff testified that there was no ditch prior to the entrance by the defendant. Some of the witnesses for the defendant testified that the ditch had been there for some years. There is conflict in the testimony as to the slope of the north forty. There is also conflict as to the drainage followed by the highway across to the north. All these are questions of fact that were decided by the jury. We cannot agree with the conclusion of the defendant that the decision of the chancellor was without sufficient evidence as to the facts or as to damages sustained or likely to be sustained, nor do we believe that the judgment in this cause was entered to satisfy the wish of a plaintiff. While the evidence is in conflict on many points, there is sufficient evidence in the record to satisfy the chancellor to use his discretion as to the amount of the writ of injunction. Since the greater number of witnesses support the position of the plaintiff, we do not feel warranted in disturbing the findings of the court whose province it was to determine upon which side was the better weight of the evidence. The record of the Circuit Court will be affirmed.

Affirmed.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

14 I.A.^{2d} 127

May Term, A. D. 1957.

General No. 10122

Agenda No. 2

Perol Fowler,

Petitioner-Appellant,

vs.

Vernon W. Cook, Conservator
of the Estate of Allie Bell
Underwood, Incompetent,

Respondent-Appellee.

Appeal from the
Circuit Court of
Vermilion County.

REYNOLDS, P. J.

This is an appeal from an order of the Circuit Court of Vermilion County dismissing an appeal filed by a niece of one Allie Bell Underwood, adjudged incompetent in the probate court of that county, and dismissing a petition for the removal of the conservator pending a determination of the appeal.

Allie Bell Underwood was a widow, and on July 2nd, 1956, one William Parson, who was not related in any way to Allie Bell Underwood filed a petition in the Probate

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OFFICE OF THE
ATTORNEY GENERAL
STATE OF NEW YORK

14 I.A. 127

NO. 127, I.A. 127

Exhibit No. 1

General No. 127

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Court of Vermilion County, Illinois to have Allie Bell Underwood adjudged incompetent. A six man jury found her incompetent, and Vernon Cook was appointed as her conservator. Afterwards, Ferol Fowler, a niece, filed her appeal in the Circuit Court of Vermilion County to the finding of incompetency, by the County Court, and also filed her petition in the Circuit Court for an order abating the order of the Probate Court and to remove Vernon Cook as conservator. On motion of Vernon Cook, the Circuit Court dismissed the appeal and the petition. The matter was then appealed to this court.

After the filing of the appeal to this court, on February 17, 1957, Allie Bell Underwood died. A suggestion of her death and motion to dismiss the appeal was filed in this court by the appellee and this motion is resisted by the appellant. In passing on the appeal, both the record of the appeal, and the motion to dismiss after the death of Allie Bell Underwood and the reply to the motion will be considered. From the motion to dismiss after the death of Allie Bell Underwood and the reply of the appellant, it appears that an administrator for the estate of the decedent has been appointed by the Probate Court of Vermilion County and is now acting. The appellee contends that the matters involved in the appeal are now moot and the appellant contends that there are still matters pending in the Probate and

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Circuit Courts of Vermilion County, concerning the conservator of Allie Bell Underwood, the Estate of James Underwood, Deceased, Allie Bell Underwood being the sole heir, and the Estate of Allie Bell Underwood, Deceased.

As a practical matter, the only matters before this court are the questions of the validity and correctness of the order of the Probate Court of Vermilion County finding Allie Bell Underwood incompetent, and the appointment of a conservator. The death of Allie Bell Underwood settled those matters and as contended by the appellee they are moot. The administration of the estate of James Underwood, deceased, and the administration of the estate of Allie Bell Underwood, now deceased, are all matters that lie within the jurisdiction of the Probate Court of Vermilion County and are not before this court. The appeal will be dismissed.

Appeal Dismissed

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of the order of the present Court of Appeals.

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1st DIVISION

Abstract

General No. 11068

Agenda No. 14

IN THE

APPELLATE COURT OF ILLINOIS

FILED

JUL 25 1957

14 I.A. 152^{2d}

SECOND DISTRICT--FIRST DIVISION

U. V. WUNDER
Appellate Court Second District

May Term, A.D., 1957

GLENN E. DONATH and
ANNA R. DONATH,

Plaintiffs-Appellees,

vs.

MILTON B. RAFFLE, GLORIA
RAFFLE, HYMAN RAFFLE and
EVELYN HYMAN RAFFLE,

Defendants-Appellants.

Appeal from the Circuit
Court of Winnebago
County, Illinois

DOVE, P.J.

On April 2, 1951, the defendants, Hyman Raffle and Milton Raffle, partners, doing business as Triple-Tite Construction Company, entered into a written contract with the plaintiffs, Glenn E. Donath and Anna R. Donath, by the provisions of which the construction company in consideration of \$1,120.00 agreed to furnish the necessary material to re-side with "White Alside Aluminum Siding" the residence of the Donaths in Loves Park, Illinois. In addition to furnishing the material, the company agreed to furnish a limited amount of labor. The siding was delivered in accordance with the contract, and the Donaths paid the contract price. The siding did not prove satisfactory, and on October 26, 1953, a second contract was

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entered into by the same parties by the provisions of which the Raffles agreed to apply a product called "Thermabond" over the entire wood area of plaintiffs' dwelling. The contract was in writing, detailed the work to be done and stated that the Raffles were to furnish the labor and materials necessary to perform the modernization job. In consideration of this being done the Donaths agreed to pay \$2,000.00 in addition to the return of the aluminum siding, which had been used, and the company "guaranteed the labor and materials."

The product was applied and the job completed in November, 1953. Two months later Donath noticed defects in the work and he went to the office of the company and complained to Milton Raffle who told him not to worry, that the Termabond company would fix it or if it did not, he would. Donath continued to complain and in March, 1954, at the request of the Raffles, a representative of the manufacturer, accompanied by an employee of Milton Raffle, examined the siding and made some repairs thereto and stated to Donath that they wished to wait until warm weather to see what then ~~happened~~ would happen. The material deteriorated. The parties consulted an attorney with reference to bringing suit against the Thermabond company or its officers and on June 2, 1954, the parties entered into a further written agreement by the provisions of which the construction company agreed to pay all attorney fees to an attorney to be selected by the construction company and bring an action, if necessary, to enforce the rights of the Donaths against the manufacturer, Thermabond, Inc. This agreement recited that the parties intended to demand from Thermabond, Inc., the removal and replacement of the siding which was then on the premises

owned by the Donaths. The agreement then continued: "In the event that a replacement of the siding is made and the replaced siding costs less than the original siding the Donaths will be compensated for the difference and if the siding costs more than the present siding, Triple Tite Construction Company agrees to pay the difference."

No action or proceeding having been taken against Thermabond, Inc., or its officers, and the Donaths having commenced their complaints to the construction company, Milton B. Raffle, on behalf of the construction company on December 8, 1964, wrote his lawyer as follows (omitting the address and signature): "We have been waiting for sometime now, for the result of the suit which I wanted filed against the officers of the now defunct Thermabond Company of Akron, Ohio. Until now I have received no word from you which even assures me that this suit has been filed. Mr. Donath has been in my office and says that now the material has further deteriorated to a point where the finish has separated from the base, and his home is becoming more and more unsightly as time goes by.

"I am enclosing a copy of a credit report which I have recently run on this company, and as you will be able to tell by the contents, the suit should be filed against the officers of the company individually for recoupment. I can obtain for you pictures showing the bad shape of the material as well as written affidavits from Mr. Donath and his wife and possibly their neighbors.

"I realize that sometimes these things of necessity can take a great deal of time to consummate but anything that you can do to expedite it will be greatly appreciated by the

Donaths as well as myself. As you will remember, Mr. and Mrs. Donath were the people with whom I visited your office one day last summer, and for whom you negotiated a mortgage with my mother. If there are any questions concerning this which you would like answered, feel free to call me at any time and I will give you any of the details which you might desire."

The properties involved in this proceeding are located in Rockford, and have been, and were at the time of the hearing, occupied by the Raffles as their respective residences. The property occupied by Milton B. Raffle was acquired by him on April 2, 1951, at which time title thereto was conveyed to him and his wife, as joint tenants. The property occupied by Hyman Raffle was acquired by him also in the early part of 1950 and was conveyed to Hyman Raffle and Evelyn Raffle, his wife, as joint tenants.

On July 14, 1954, Hyman Raffle executed a deed conveying his interest in the property where he lived to his wife, Evelyn Raffle, and two days later this deed was recorded. On January 27, 1955, Milton B. Raffle and Gloria, his wife, conveyed the property they lived in to Katherine Lawson and on the same day Katherine Lawson executed a deed conveying the premises to Gloria Raffle, wife of Milton B. Raffle. After the instant complaint was filed Gloria Raffle and her husband conveyed this property to Sam and Ida Raffle, parents of Milton and Hyman Raffle. These deeds were duly recorded. All the deeds were voluntary conveyances and no consideration passed from the several grantees to the grantors.

On July 1, 1955, Glenn E. Donath and Anna R. Donath filed their complaint in the Circuit Court of Winnebago County

against Milton B. Raffle and Hyman Raffle to recover the damages they sustained for breaches of the contracts of April 2, 1951, and October 26, 1953. This action resulted in a judgment being rendered in their favor and against Milton B. Raffle and Hyman Raffle for \$2940.00 and costs on November 9, 1955. Upon this judgment an execution was duly issued but returned by the sheriff unsatisfied.

On November 14, 1955, the instant complaint was filed and thereafter an amended complaint was filed. The amended complaint recited the foregoing facts and charges that the conveyances of July 14, 1954, and January 27, 1955, were made after the indebtedness, which was reduced to judgment on November 9, 1955, had accrued; that said conveyances were fraudulent and void, made with the express purpose and intent of preventing the judgment, which plaintiffs obtained, from becoming a lien on the described premises and were made in order to hinder, delay and defraud plaintiffs in collecting their said judgment. The prayer of the amended complaint was that the conveyances be declared void and set aside as against the judgment of the plaintiffs and that their judgment be declared a lien upon the several interests of Milton B. Raffle and Hyman Raffle.

The answer of the defendants admitted the allegations of the amended complaint as to the record title and conveyances of the property involved herein and admitted the other allegations of the amended complaint except they denied that the several conveyances were fraudulent or made to defraud plaintiffs or that they were voluntary conveyances and made without consideration. As an affirmative defense the defendants averred that at the time the conveyances were made the grantors retained

sufficient funds and property to pay all expected or contemplated indebtedness and at that time each grantor was entering into a new business venture and it was his desire to set aside a reasonable portion of his estate so as to keep his wife and family "secure from the evil effects of the reverse of fortune."

Upon the issues thus made by the pleadings a hearing was had before the chancellor resulting in a decree granting the relief prayed and setting aside the conveyances of July 14, 1954, and January 27, 1955, as against the judgment of the plaintiffs. To reverse this decree defendants appeal.

Counsel for appellants concede that the conveyances set aside by the decree were voluntary, made without consideration and that at the time the complaint was filed, which resulted in the judgment which forms the basis of the instant proceeding, the judgment debtors were insolvent. Counsel insist, however, that the evidence discloses that when these conveyances were made Milton and Hyman Raffle were solvent and therefore the conveyances were not made to hinder, delay or defraud creditors. In support of this contention counsel cite and rely upon *Mills v. Susanka*, 394 Ill. 439; *Elmora v. Rogers*, 203 Ill. 464; *State Bank of Clinton v. Barnett*, 250 Ill. 312; and, *Woodham v. Miller*, 319 Ill. App. 388.

One of the issues in *Mills v. Susanka*, 394 Ill. 439, was whether there was a bona fide purchase by Mr. Susanka from Elizabeth Mills of fifteen shares of the capital stock of the Fabst Pharmaceutical Company. The Master held there was no consideration paid therefor and that Mrs. Mills was the actual owner of the stock. The circuit court approved

these conclusions and confirmed the report of the Master and so decreed. The appellate court reversed that decree on the sole ground that the transfer of the stock from Mrs. Mills to Mr. Susanka constituted fraud in law. In reversing that decree and remanding the case to the appellate court with directions to pass upon the question whether the sale was a bona fide one, the court, in its opinion, quoted from *Dimond v. Rogers*, 203 Ill. 486, to the effect that in a case of a voluntary conveyance to a husband in order for a creditor of the wife to obtain relief it was necessary to prove that the judgment debtor did not retain enough property or money to pay her debts. The relation of husband and wife was not, however, involved in *Mills v. Susanka*, supra.

Dimond v. Rogers, 203 Ill. 464, was a creditor's bill for discovery and the application of any discovered assets to the payment of plaintiff's judgment. The evidence disclosed the recovery of a judgment against the wife of the defendant, the issue and return of an execution, the transfer by the wife to the husband of certain real estate without consideration and the insolvency of the judgment debtor. The circuit court granted the relief prayed and the appellate court reversed that decree, but the Supreme Court reversed the judgment of the appellate court and affirmed the decree of the circuit court.

State Bank of Clinton v. Barnett, 250 Ill. 312, was a creditor's bill resulting in a decree in ^{favor} ~~favor~~ of the plaintiff, which was affirmed by the appellate court. In reversing the decree of the circuit court and the judgment of the appellate court the court cited *Dimond v. Rogers*, 203 Ill. 464, stating that it was necessary to aver and prove

the insolvency of the judgment debtor at the time the gift was made, the court stating that it might well be that when ~~the~~ ^{grantor} ~~she~~ made the gift to her daughter in December, 1904, she retained abundant means to pay all her indebtedness and that she had only become insolvent at the time the judgment was secured against her in July, 1907.

Woodham v. Miller, 319 Ill. App. 388, was a complaint in aid of execution to set aside two conveyances from parents to their daughter. The chancellor dismissed the complaint for want of equity and the appellate court affirmed, finding that a valuable consideration passed for the conveyances and that there was no proof of actual or constructive fraud.

In the instant case the record discloses that on October 26, 1953, the parties entered into a written contract under the provisions of which definite obligations to appellees were incurred by Milton and Hyman Raffle and these obligations were recognized by the Raffles as evidenced by their agreement with appellees on June 4, 1954. Forty days later Hyman Raffle, without consideration, caused title to his residence property to be conveyed to his wife. Thereafter and on December 8, 1954, the Raffles still recognized their obligations to the Donaths and wrote their attorney to proceed with their suit against the Thermabond company or its officers. A little over a month later, January 27, 1955, Milton Raffle, without consideration, caused the title to his residence property to be conveyed to his wife. These conveyances of July 14, 1954, and January 27, 1955, stripped Milton and Hyman Raffle of the record title of all the real estate either of them owned. Four months later the Donaths filed their complaint

against Milton and Hyman Raffle to recover damages for their failure to fulfill the obligations they incurred under the contract of October 26, 1953, and on November 9, 1955, recovered the judgment upon which the instant proceeding is based. Appellees were clearly existing creditors at the time both of these conveyances were executed and thereafter became judgment creditors.

Counsel for appellants in the preparation of their affirmative defense were familiar with the language used in *Harting v. Jockers*, 136 Ill. 627, which was a proceeding to set aside an alleged fraudulent contract. In the course of its opinion the court stated that a voluntary transfer or conveyance of property by a debtor as against existing creditors is fraudulent and void; that a debtor may not by gift or other voluntary transfer of his property to others hinder or delay his creditors in the collection of their just demands and that the law presumes that any act done which will have the effect of hindering and delaying creditors was done with that fraudulent purpose and intent. The court then went on to say that one engaged in active business may regard it as his duty to his wife and children, dependent upon him for support, to set aside by conveyance a reasonable portion of his estate and thereby keep them secure from the evil effects of the reverses of fortune. It is there said that where this is done and the donor retains ample property sufficient to satisfy and liquidate all just demands against him and without endangering or interfering with his solvency, the gift would ordinarily be upheld.

Upon the hearing in the instant case Hyman Raffle testified in his own behalf that on July 14, 1954, he did

not consider that he had any liability in connection with his transactions with appellees; that he was about to enter into a new business at that time and conveyed his home to his wife on the advice of counsel and that he had assets ten to one over his liabilities. Milton Raffle testified that on January 27, 1955, which was the date he conveyed his property to his wife, he had "a lot of money and a lot of accounts receivable" and that a few days after January 27, 1955, his total assets above his liabilities amounted to \$14,519.00. The record is silent as to the nature of the assets or what the liabilities of Hyman or Milton Raffle consisted. It did disclose that Hyman Raffle did not consider any liability to the Donaths when he testified he had assets ten to one over his liabilities.

In *Birney v. Solomon*, 348 Ill. 410, it appeared that on September 27, 1923, Jacob Solomon conveyed all the real estate he owned to his wife, Hazel. Prior to that time the Alexander County National Bank had extended him a line of credit and he was indebted to the bank. On January 30, 1925, the bank obtained judgment against him upon an indebtedness evidenced by notes held by the bank for \$11,846.77. The same day the bank filed its creditor's bill to set aside the conveyance of September 27, 1923. It was there contended that plaintiff could not maintain its suit unless there was a positive showing of the insolvency of Jacob Solomon at the time of the conveyance. In this connection the court said (pp. 414-415): "The established rule in this State does not require proof of actual insolvency in order to render a voluntary conveyance void, especially when the conveyance

is between husband and wife or parent and child. The true test in determining the validity of a voluntary conveyance as against creditors in such a case is whether or not it directly tended to or did impair the rights of creditors. It is of no moment that the property remaining in the grantor's hands after the conveyance was in nominal value more than equal to the amount of his indebtedness if subsequent events show that the property retained was not sufficient to discharge all his liabilities. (Hockett v. Bailey, 86 Ill. 74; Hauk v. VanIngen, 196 Id. 20; Patterson v. McKinney, 97 Id. 41.) The doctrine is firmly declared to be that one must be just before he is generous. What may be in the mind of the grantor when he makes a voluntary conveyance to his wife or child is immaterial, for if it results in hindering, delaying or defrauding creditors it must be regarded as fraudulent. A donor may make a conveyance with the most upright intentions, and yet, if the transfer hinders, delays or defrauds his creditors it may be set aside as fraudulent. (Marmon v. Harwood, 124 Ill. 104; McKey v. McCoid, 298 Id. 566.) Of such force is this rule that where one is found to be insolvent after having made a voluntary conveyance to his wife the burden of dispelling the implication of fraud as against pre-existing creditors is upon his grantee. Dillman v. Nadelhoffer, 162 Ill. 625; Moritz v. Hoffman, 35 Id. 553; Patterson v. McKinney, supra."

In the instant case we are satisfied the property retained by the Raffles after their conveyances to their wives was not equal to their indebtedness. A few months after the conveyances they admit their insolvency. Their simple conclusions that they were not insolvent at the time

1st DIVISION

FROM
PAUL V. WUNDER
CLERK APPELLATE COURT
OTTAWA, ILLINOIS
Abstract

General No. 11047

Agenda No. 5

IN THE

14 I.A. 214²⁰¹

APPELLATE COURT OF ILLINOIS

FILED

JUL 22 1957

SECOND DISTRICT-FIRST DIVISION

PAUL V. WUNDER
Clerk Appellate Court Second District

May Term, A.D., 1957

JOSEPHINE C. MINNEC,

Plaintiff-Appellee,

vs.

JOHN M. MINNEC,

Defendant-Appellant.

APPEAL FROM THE CIRCUIT
COURT OF DUPAGE COUNTY,
ILLINOIS.

DOVE, P. J.

The parties to this proceeding were married on June 13, 1936, and for some time lived on West Monroe Street in Chicago. Two children were born as the issue of said marriage, Elaine, now of age, and John, who, at the time the instant complaint for divorce was filed on December 22, 1955, was sixteen years of age and in the custody of his mother.

in the early part of
It appears from the record that ~~on~~ April ~~19~~, 1948, Mrs. Minnec filed in the Circuit Court of Cook County her complaint setting forth various acts of cruelty and praying for a divorce. The defendant was duly served with summons and on May 12, 1948, filed his answer to said complaint, admitting the marriage, the residence of the plaintiff and the birth of the children, but denying the charges of cruelty.

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June 10, 1966. and the same will be filed in the
in Chicago. Two additional copies will be made of this
material, Elaine, one of which will be sent to the
the instant complaint for divorce was filed on December 10,
1966, and dated June 10, 1966, in the County of Cook,
Illinois.

in the early part of
it appears from the record that XXX was born 1940,
and named him as the father of said young man
completely failing to mention any of the other
for a divorce. The defendant was not aware of the
and on May 10, 1966, filed his motion for judgment
admission and recovery, and evidence of the defendant was
the date of the children, and under the evidence of the

While this suit was pending and undisposed of in the circuit court of Cook County, John M. Minnec, on April 8, 1948, filed his complaint in the Superior Court of Cook County alleging that he was a resident of Cook County and praying for divorce. These causes were consolidated and on May 21, 1948, the parties appeared in open court and advised the court of their reconciliation and an order was entered dismissing both suits without prejudice to either party. The formal order of dismissal was entered on June 28, 1948.

On June 26, 1948, Mr. Minnec filed a second complaint for divorce in the Superior Court of Cook County, alleging that he was then a resident of Cook County. This complaint was heard and on August 18, 1948, a default decree for divorce was granted the plaintiff. On September 16, 1948, Mrs. Minnec filed therein her petition to vacate that decree and on October 18, 1948, an order was so entered. Thereafter Mrs. Minnec filed her answer and counterclaim and an order was entered directing Mr. Minnec to pay his wife temporary alimony and child support. On June 17, 1949, the counterclaim and complaint were both dismissed and the parties resumed their marital status.

Shortly thereafter and on July 18, 1949, Mr. Minnec filed in the Kane County Circuit Court another suit against his wife which resulted, on August 11, 1949, in a default decree for divorce being rendered in his favor upon a written entry of appearance purporting to have been executed by the defendant.

On December 22, 1955, Mrs. Minnec filed her petition to vacate the decree of August 11, 1949, and on March 8, 1956, the Circuit Court of Kane County, upon this application, entered

The District Court at Lake County, Wisconsin, do hereby certify that the following is a true and correct copy of the original as filed in its files:

In testimony whereof, I have hereunto set my hand and the seal of said court at Oshkosh, Wisconsin, this 1st day of June, 1906.

Judge of the District Court.

an order vacating this decree and dismissing the complaint. This order found, among other things, that the decree of August 11, 1949, was obtained by Mr. Minnec perpetrating a fraud upon the court. That order was affirmed by this court (Minnec v. Minnec, Gen. No. 10982, an opinion therein being this day filed).

On December 22, 1955, Mrs. Minnec filed the instant verified complaint for divorce in the Circuit Court of DuPage County. She alleged she was a resident of DuPage County and averred that from the time of the marriage of the parties on June 13, 1936, she had lived and cohabited with her husband as his wife during various intervals until November 12, 1955. Her complaint recited a history of their marital difficulties, alleging some of the foregoing facts and charging that while the parties were living together on November 12, 1955, at Lombard in DuPage County, the defendant beat her, inflicting grievous injuries; that she sought the police, had him arrested and he was found guilty of assault and battery. Her complaint then alleged that subsequent to this assault defendant advised her that he had procured the decree of divorce on July 18, 1949, and that he was not legally married to her and that consequently he had no duty or obligation to support her.

The complaint further alleged that this was the first knowledge she had of such proceedings; that she consulted an attorney and was advised by him on November 15, 1955, of the proceedings had in the Circuit Court of Kane County, resulting in the decree of August 11, 1949. She averred she had never been served with summons; that she was not aware of ever having affixed her signature to any waiver of

service or entry of appearance and that her purported signature is either a forgery, or, if genuine, was procured from her by fraud and deceit on the part of her husband. She further averred that if she did affix her signature to said waiver of service and entry of appearance, she was never apprised of its nature and was misled with respect thereto; that when informed of said decree she took steps to set it aside and had filed in the Circuit Court of Kane County her petition to vacate said decree on the ground that the Circuit Court of Kane County was without jurisdiction of the parties thereto and that she had a meritorious defense to the complaint.

The complaint further charged that the defendant was engaged in buying and selling real estate, subdividing property and collecting rentals from which he derived a substantial income and is able to support his wife and children and that the plaintiff was without funds. She alleges that she and her husband are the owners of several parcels of real estate, describing two of them, and that they also have a beneficial interest in certain other real estate, the title to which is vested in the LaSalle National Bank as trustee; that she is informed that the Royal Home Builders, a corporation, and Proviso Realty Corporation have or claim some right, title or interest in the real estate and that said corporations are owned and controlled by John Minnec. The complaint then alleges that the defendant is a man of violent and ungoverned temper and on December 6, 1955, he cut the telephone wires in order to annoy and harrass her and she fears that unless he is enjoined he will further assault, molest, annoy and ill-treat her.

The complaint then charges that the defendant has agreed to sell certain real estate, not described, to Novak Builders, a corporation, whereby \$20,000.00 will accrue to him, which she fears will be lost to her and prays for an order enjoining Novak Builders, Inc., from paying the sum to him or anyone in his behalf. The complaint then alleged, upon information and belief, that John Minnec maintains one or more safety deposit boxes in which he keeps large amounts of cash, certificates, and bonds and she fears that unless he is enjoined he will take from the boxes the securities therein and thus deprive her of her rights to look for the same for support and maintenance of herself and her child. Her complaint further charges that on December 9, 1955, the defendant caused a notice to be sent to her, requiring her and her children to vacate the home at 104 East Grove Avenue, Lombard, Illinois, and she fears that unless enjoined the defendant will further assault her and expel her from said premises. The complaint made John Minnec, Royal Home Builders, Inc., Proviso Realty Corporation, LaSalle National Bank and others named in the complaint parties defendant and prayed for a dissolution of the marriage, the care and custody of their minor child, John J. Minnec, attorney fees, temporary and permanent support for herself and child and for an injunction without notice and without bond.

Upon her motion, an order was entered waiving the sixty-day requirement and her complaint was filed and a summons issued. A preliminary injunction was ordered to issue without notice and without bond and the summons and injunction writ were duly served on the defendant on December 22, 1955. On December 29, 1955, the defendant filed his

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motion to dismiss and an affidavit in support thereof. The motion to dismiss alleged that it appeared from the complaint that a decree of divorce was entered by the Circuit Court of Kane County and that said decree had never been vacated and that same still stands in full force and effect, and concluded that until a determination is made in that court of the validity of that decree the plaintiff cannot maintain this action.

On January 6, 1956, the plaintiff filed her petition alleging the filing of her complaint and that she was without means and money for support. The petition alleged that defendant has an income of over \$2,000.00 per month and prayed for an order directing the defendant to pay a reasonable sum in order to support her during the pendency of the suit. On the same day, January 6, 1956, defendant filed his motion to dissolve the temporary injunction and this motion was heard and allowed in part and an order entered vacating the writ as to some of the defendants and vacating it in part as to the appellant.

On January 13, 1956, the defendant filed a petition reciting the fact that the defendant had received notice that the plaintiff intended to take his deposition and referring to the motion of the plaintiff to vacate the August 11, 1949, Kane County decree which was pending and undisposed of. This motion prayed for the entry of an order prohibiting the plaintiff from taking his deposition or that the deposition be limited to questions involving the Kane County divorce decree. Upon a hearing of that motion and the motion of plaintiff for temporary support an order was entered restricting

motion is made and in addition to report thereon. The motion is denied subject to the report of the committee.

On January 7, 1968, the following information was received from the Office of the Attorney General, State of New York, regarding the activities of the Communist Party, USA, in the State of New York, during the period from January 1, 1967, to December 31, 1967.

[illegible]

the deposition to a period between July 1948 and July 1951 and limiting the inquiry as to the defendant's property. An order was also entered on that date, directing the defendant to pay plaintiff \$25.00 per week as temporary alimony and support for the minor child in addition to the payment of utilities for the home in Lombard occupied by the plaintiff.

On February 17, 1956, plaintiff filed a petition praying that the defendant be required to show cause why he should not be attached for contempt for failure to make the payments as directed by the previous order and for harrassing and annoying the appellee with reference to the custody of the children. The defendant answered this petition denying he had violated any of the orders of the court and averred that his income did not exceed \$2900.00 per year.

On March 9, 1956, by leave of court, the plaintiff filed a supplement to her complaint, averring that on the previous day, March 8, 1956, the Circuit Court of Kane County had entered an order finding that defendant, John M. Minnec, was not a bona fide resident of Kane County when he filed his divorce proceedings which resulted in the divorce decree of August 11, 1949; that the appearance executed by Josephine Minnec in that proceeding was obtained by her husband through misrepresentation and fraud and that he had perpetrated a fraud upon the Circuit Court of Kane County in securing that decree. Accordingly, the decree divorcing the parties hereto, rendered by the Circuit Court of Kane County on August 11, 1949, was vacated and set aside and the complaint of John M. Minnec was dismissed for want of jurisdiction.

In his answer to this supplement defendant alleged that he intended to appeal from the order entered on March 8,

[illegible]

1956, and that by so doing the order of March 8, 1956, would be stayed until final disposition of the appeal, and concluded that the instant complaint was, therefore, prematurely filed.

On April 20, 1956, another petition to hold defendant in contempt of court was filed by the plaintiff, alleging that he had violated the injunction by breaking into the garage of plaintiff's home in Lombard and taking an automobile therefrom. To this petition the defendant answered that he needed the car, as his other car had been involved ⁱⁿ a collision; that other persons acting for him found the garage door ajar and entered and removed the car for the defendant.

Thereafter and on April 27, 1956, defendant filed a motion praying for the dismissal of the complaint upon the ground that his marriage to the plaintiff on May 23, 1936, was void because the plaintiff had previously been married three times, the first time to Peter Bushema on April 14, 1912, the second time to Albert C. Higgins on April 7, 1922, and the third time to Thomas Vitullo on September 17, 1927. This motion was subsequently amended by averring that the said Thomas Vitullo died subsequent to the marriage of the parties hereto. To this motion plaintiff filed a response and a cross-motion on May 24, 1956, and the following day ^{she filed} a petition alleging that she had incurred costs amounting to \$305.00 in addition to attorney fees; that she was without funds and alleging that defendant was financially able to provide her with costs and attorney fees.

The same day plaintiff obtained leave to file her amended complaint and it was filed that day and an order entered setting defendant's motion to modify the temporary injunction and plaintiff's petition for costs and temporary

1902, and that of the other the date of 1901, and
he stated that these dates were the dates of the
first of the two complaints, and, in consequence, that the
on April 20, 1902, another petition to John F. Kennedy
in support of which was filed by the plaintiff, alleging
that he had received the information by means of the
return of plaintiff's name in the list of names of persons
interested. The date of the first complaint was the date
in the year, as the date of the first complaint was the date
that other persons received the information by means of the
and others and received the information by means of the
The date of the first complaint was the date of the first
a notice of the first complaint to the plaintiff was the
others that his complaint in the plaintiff was the date of
and that because the plaintiff had received the information
others that, the first time he received the information was
1901, the second time he received the information was the date of
and that the first time he received the information was the date of
This action was commenced by means of a petition to the
and that the first time he received the information was the date of
others that, the first time he received the information was the date of
and a notice of the first complaint to the plaintiff was the date of
petition alleging that he had received the information by means of the
1901, as is alleged to attorney fees: that was the date of
facts and alleging that because the plaintiff was the date of
moving and the date of the first complaint was the date of
The date of the first complaint was the date of the first
and that the first time he received the information was the date of
others that the first time he received the information was the date of
information and plaintiff's petition for the date of the first

attorney fees for hearing for June 18, 1956, and directing that plaintiff may take a discovery deposition/^{as}to the assets of the defendant.

On June 12, 1956, defendant filed his notice to the effect that he appealed from the portion of this order of May 25, 1956, permitting plaintiff to take discovery depositions and on June 16, 1956, he filed his praecipe for the record. Subsequently and on June 18, 1956, an order was entered granting defendant leave to withdraw this notice of appeal and his praecipe for the record. An order was also entered at that time directing defendant to pay \$1250.00 temporary attorney ~~attorney~~ fees and \$286.00 costs, the order providing that defendant pay \$256.00 on July 18, 1956, and a similar sum each month until the total of \$1536.00 is paid.

Thereafter and on June 27, 1956, the defendant filed his petition reciting the order of June 18, 1956, whereby he was directed to pay \$1536.00 and averring that on June 22, 1956, he was ordered by the circuit court of Kane County to pay \$1400.00 attorney fees and \$400.00 costs within thirty days; that from the order of the Kane County Court he proposes to appeal; that he is without funds to pay his own attorney fees as his income is less than \$500.00 per month, which "is no more than adequate to maintain himself and the household of the plaintiff." By this petition defendant sought to have the injunction modified and the amount of attorney fees reduced. Upon a hearing the court entered an order modifying the injunction by permitting two improved lots of the defendant to be used by defendant so that his notice of appeal from the decree and order of the Kane County Circuit Court to this court might operate as a supersedeas

1. The following information was obtained from the records of the Federal Bureau of Investigation, Bureau of Prisons, and the Department of Justice, Office of the Inspector General, regarding the activities of the above named individuals:

[illegible][illegible]

and amending the order of June 18, 1956, by providing that defendant pay \$128.00 per month instead of \$256.00 per month for a stated period. To reverse this order of June 28, 1956, defendant filed his notice of appeal on July 13, 1956.

On July 20, 1956, plaintiff filed her petition setting up the foregoing orders and praying for an order requiring defendant to pay attorney fees and costs to be expended by her in following this appeal. Defendant answered this petition setting up the order of June 28, 1956, requiring him to pay plaintiff \$1536.00 and the order of the Circuit Court of Kane County requiring him to pay plaintiff \$1400.00.

On August 31, 1956, plaintiff filed another petition seeking to have defendant adjudged in contempt of court and, among other things, averred that notwithstanding the injunction writ defendant filed on August 21, 1956, a replevin suit against his minor son, John Minnec, by means of which defendant obtained possession of certain described tools, personal clothing and jewelry from the premises of the plaintiff. An answer to this petition was filed by defendant whereby he sought to justify the several alleged contemptuous acts. The issues made by this petition and answer were referred to a special Master to hear the testimony and report the same with his conclusions of law and fact. On the same day defendant was ordered to pay \$800.00 to plaintiff to apply on her attorney fees. On September 12, 1956, a supplemental notice of appeal was filed by defendant from the order of September 10, 1956, which required him to pay attorney fees and which referred the issues, made by the petition and answer, to a special Master.

The record further discloses that on October 17, 1956, plaintiff filed in the Circuit Court another petition

reciting the orders of July 28, 1956, and September 10, 1956, alleging that defendant had paid no part of the \$1530.00 as directed by the order of July 28, 1956, or paid any part of the \$800.00 directed to be paid by the order of September 10, 1956. Defendant answered this petition admitting he had paid nothing in pursuance of said orders and as an excuse for not doing so alleged that he had been seriously ill and had undergone major surgery, from which he was convalescing, and that he was unable to pay because of a lack of income and liquid capital.

On October 26, 1956, the issues made by the petition filed October 17, 1956, and the answer thereto were heard by the Chancellor. At the commencement of the hearing defendant's counsel stated that his client was at his home convalescing from an operation but by agreement of counsel the testimony of the witnesses who were present was taken that day.

From this evidence and other evidence produced at a subsequent hearing it appears that defendant was a beneficiary of Trust No. 38246 of which the Chicago Title and Trust Company was trustee. This trust is dated March 19, 1956, and on September 13, 1956, defendant assigned his beneficial interest to Anna Maria Busalachi. Under an escrow agreement with the Chicago Title and Trust Company a deposit was made of \$10,000.00 on April 17, 1956. Either on that day or on April 19, 1956, the defendant received from the trustee its check for \$9,953.00, which check was endorsed by defendant and paid on April 20, 1956. In another trust a deposit of \$20,000.00 was made on September 5, 1956, and a check representing this sum payable to Royal Home Builders was delivered by the trustee to defendant the same day.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the Americas (CLA) in the United States. The Commission is therefore unable to determine whether the CLA is active in the United States or whether it is merely a propaganda organization. The Commission is therefore unable to determine whether the CLA is active in the United States or whether it is merely a propaganda organization.

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1. The first of these is the fact that the Government has not been able to obtain the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic of China. This has been due to the fact that the Government has not been able to obtain the necessary funds to carry out its policy of non-interference in the internal affairs of the Republic of China.

The evidence also disclosed that under this trust or escrow agreement dated April 16, 1956, defendant was to deposit with the trustee certain directions by which the trustee was to convey to Jules Construction Company certain described property for which the purchaser would deposit with the trustee or escrow agent \$20,000.00 on or before May 31, 1956, \$20,000.00 on or before September 1, 1956, \$45,000.00 on or before March 1, 1957 and \$100,000.00 on or before March 1, 1958.

The plaintiff testified in connection with what is spoken of in the record as the Marshall Field Avenue apartment and the apartment at No. 3346 West Monroe Street to the effect that when the parties were living together in November, 1955, she collected the rents therefrom, which amounted to \$1240.00 per month. At the hearing on October 26, 1956, Robert Frey, an attorney and trust officer of the Chicago Title and Trust Company, and John Evans, senior Escrow Clerk of that company, both testified and the trust agreement No. 38246 and the assignment of the beneficial interest therein of defendant to Anna Maria Busalachi, the escrow agreement No. 214418, above referred to, the written receipt of defendant to the trust company for the \$10,000.00 check and also the \$20,000.00 check both drawn by Jules Construction Company and payable to Royal Home Builders, Inc., the written receipt of defendant to the ~~trust company~~ trustee of the \$9953.00 check drawn by the Chicago Title and Trust Company and payable to the order of the defendant and also the check itself showing its payment on April 20, 1956, were all offered and admitted in evidence.

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Further work is required to develop a better understanding of the factors that influence the effectiveness of these interventions.

The number of papers about 1990 was 60 or less (see Fig. 3).

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At the conclusion of the hearing on October 26, 1956, a continuance was taken until November 9, 1956. At that time counsel for the plaintiff stated that he desired to call the defendant and examine him but defendant's counsel informed the court that the defendant was not present and stated that the defendant had advised his office that he could not be present. Counsel for defendant then stated that he understood defendant was under medical care and continued: "I cannot state to the court that is the reason he is not here because I don't know. I assume that is the case, but I can't present the court with any medical evidence to support this or anything else." Counsel for defendant then moved the court to discharge the rule to show cause and dismiss the petition and called the court's attention to the fact that two orders had been entered requiring defendant to pay attorney fees, which orders had not been met. Counsel then stated: "There are some assets it is true, but his (defendant's) cash position, his money position, is most desperate. His inability to pay these fees could be demonstrated if we could get him in here possibly. - - - My client has behaved violently in some cases, but with some considerable restraint in view of what has happened to him, a man of his temperament. - - - Counsel has many adequate remedies in these proceedings, process by garnishment, execution and levy, a great many more civil methods, if I may coin a phrase, than one of civil contempt. - - - The petition is too extreme for the nature of the problem for the nature of the uncollected obligation here and I submit some other method should have been chosen." The court denied the motion to dismiss and counsel for defendant

[illegible]

then suggested to the court that he was not able to present any proof and would like to have a continuance. The oral suggestion for a continuance was denied, and the order finding defendant in contempt was entered.

It is first contended by counsel for appellant that since the decree of August 11, 1949, rendered by the circuit court of Kane County divorcing the parties hereto was in full force and effect on December 22, 1955, the date the instant complaint was filed, the circuit court of Du Page County, a court of coordinate jurisdiction, lacked jurisdiction to entertain appellee's complaint or to proceed to determine the instant proceeding, and, therefore, the order finding appellant guilty of contempt was void. It is a familiar principle of law that when a court of competent jurisdiction once acquires jurisdiction of the subject matter of a case, its authority continues until the matter is finally and completely disposed of, and no court of co-ordinate^{jurisdiction}/is at liberty to interfere with its action. (14 Am. Jur. 435; Newman v. Commercial Bank, 156 Ill. 530, 534; People v. Morrow, 181 Ill. 315, 319; Nolan v. Barnes, 268 Ill. 515; Ill. Rev. Stat. 1955, chap. 110, sec. 48, (1-d).)

Counsel for appellee agree that this is the law but insist it has no application to the facts disclosed by this record. At the time the instant complaint was filed in the circuit court of Du Page County, the decree of the circuit court of Kane County was being directly attacked in that court. The result of that attack was a decree finding that the circuit court of Kane County lacked jurisdiction to enter the decree, and the decree was vacated. That order has been affirmed by this court. (Minneec v. Minneec, Gen. No. 10982, supra).

that suggested to the court that he was not able to present
any proof and would like to have a continuance. The court
suggested for a continuance was denied, and the order of
the defendant in contempt was entered.

It is first contended by counsel for appellant that
since the decree of August 11, 1927, rendered by the circuit
court of Kane County divorcing the parties hereto was in full
force and effect on December 22, 1927, the date the instant
complaint was filed, the circuit court of Kane County, a
court of concurrent jurisdiction, lacked jurisdiction to enter
said appellant's complaint or to proceed to determine the instant
proceeding, and, therefore, the order finding appellant guilty
of contempt was void. It is a familiar principle of law that
when a court of concurrent jurisdiction once acquires jurisdic-
tion of the subject matter of a case, its authority continues
until the matter is finally and conclusively disposed of, and no
court of concurrent jurisdiction is at liberty to interfere with the action
of another court of concurrent jurisdiction.

(17 Am. Jur. 212; Kansas v. Commercial Bank, 125 Ill. 210, 211;
People v. Brown, 123 Ill. 112, 113; People v. Brown, 123 Ill. 21,
22; Rev. Stat. 1925, chap. 110, sec. 68, 69-70.)

During the appeal it was argued that there is no law that
prevents it from an application to the facts disclosed by this
record. At the time the instant complaint was filed in the
circuit court of Kane County, the decree of the circuit
court of Kane County was being directly attacked in that court.
The result of that attack was a decree finding that the circuit
court of Kane County lacked jurisdiction to enter the decree,
and the decree was vacated. That decree was then affirmed by
this court. (Winters v. Winters, 100 Kan. 1002, 1003.)

In the cases cited by appellant to sustain his contention that the court in the instant case lacked jurisdiction, it always appeared that the first court had jurisdiction of the subject matter and acquired jurisdiction of the parties and, having thus acquired jurisdiction, it was permitted to proceed, and it retained jurisdiction to the end of the controversy and to the exclusion of any other court.

In the instant case the original complaint set forth the status of the record in the Kane County proceedings, and in the supplement thereto, filed on March 9, 1956, the determination of the Kane County suit was alleged. The issue in the Kane County case was whether the circuit court of Kane County had jurisdiction to render the decree of divorce. It originally held that it did, but on March 8, 1956, it held it lacked jurisdiction and vacated its former decree. If the contention of appellant is sustained, a litigant could institute a proceeding in a court which lacked jurisdiction of the subject matter, and a party thereto would be precluded from proceeding in the proper forum until there was a final determination of the first case in the lower court and that determination affirmed by the court of last resort. No case has been cited so holding.

In the instant case the plaintiff, a resident of DuPage County, invoked the jurisdiction of the circuit court of that county which had jurisdiction of the subject matter of her complaint. She thereby submitted herself to the jurisdiction of that court. The jurisdiction of the person of the defendant was acquired in the manner provided by law and he appeared by counsel and, after a hearing, the order entered of which he complains. While all the issues made by the supplemental complaint and answer have not been heard, this court is presented

In the event of appeal to sustain his com-
 position that the court in the instant case lacked jurisdiction
 it always appeared that the first court was not entitled to
 the subject matter and assumed jurisdiction of the parties
 and, hence, that assumed jurisdiction it was permitted to
 proceed, and to retain jurisdiction to the end of the contro-
 versy and to the exclusion of any other court.

In the instant case the original complaint set forth
 the status of the record in the Kane County proceedings, and
 in the supplemental statement, filed on March 2, 1926, the determi-
 nation of the Kane County suit was alleged. The issue in the Kane
 County case was whether the circuit court of Kane County had
 jurisdiction to render the decree of divorce. It originally
 held that it did, but on March 8, 1926, it held to the contrary
 and vacated its former decree. It then concluded of
 appeal is sustained, a different result might constitute a proceeding
 in a court which lacked jurisdiction of the subject matter, and
 a party thereto would be excluded from proceeding in the proper
 court. Such a result was a final determination of the issue raised
 in the lower court and the determination affirmed by the court
 of last resort. No case has been cited to the contrary.

In the instant case the plaintiff, a resident of Utah
 County, invoked the jurisdiction of the circuit court of that
 county when she instituted or the subject matter at her own
 election. The decree awarded her the custody of the children
 and the possession of the property of the parties at the defendant's
 was required in the manner provided by law and as approved by
 counsel and, after a hearing, the order required of which is
 compliance. While all the issues made by the supplemental com-
 plaint and answer have not been passed, this court is presented

with a transcript of the proceedings had in the trial court consisting of 492 pages. In our opinion, there is no merit in appellant's contention that the Circuit Court of DuPage County ^{lacked} ~~had~~ jurisdiction to enter the orders which appellant seeks to have reviewed by this court.

It is next insisted that appellee did not prove that whatever income appellant may have had was not needed in his surgical treatment. Counsel argue that even though the officers of the Chicago Title and Trust Company produced upon the hearing instruments showing substantial payments to appellant and to the Royal Home Builders, they do not prove that appellant had any equity in the described properties and that simply because substantial sums of money passed through appellant's hands it does not follow that he had any means to pay for appellee's support or for her attorney fees. Counsel conclude that it is not a contempt of court to fail to pay money which one neither has nor can obtain.

The record discloses appellant never appeared at the hearings or offered any testimony in connection with his financial status or made any explanation in connection with the ownership of the substantial sum which counsel state the evidence disclosed "passed through his hands." Appellant knew whether this substantial sum belonged to him or someone else. The burden of proof was upon him to divulge the true situation. He should not be permitted to remain silent and now insist he is financially unable to comply with the order. *Shaffner v. Shaffner*, 212 Ill. 492, was an appeal from an order of the appellate court which affirmed the order of the circuit court which found appellant guilty of contempt of court for failure to pay alimony in accordance with a decree of that court. In the course of its opinion

with a transcript of the proceedings had in the trial court consisting of 192 pages. In our opinion, there is no merit in appellant's contention that the Circuit Court of Cook County ^{lacked} jurisdiction to enter the order which appellant seeks to have reviewed by this court.

It is next insisted that appellee did not prove that whatever income appellant may have had was not needed in his medical treatment. Counsel argues that even though the officers of the Chicago Title and Trust Company produced upon the hearing instruments showing substantial payments to appellant and to the Royal Home Building, they do not prove that appellant had any equity in the described properties and that equity because substantial sums of money passed through appellant's hands it does not follow that he had any means to pay for appellee's support or for her attorney fees. Counsel contends that it is not a contempt of court to fail to pay money which one neither has nor can obtain.

The record discloses appellant never appeared at the hearings or offered any testimony in connection with the financial status or made any explanation in connection with the ownership of the substantial sum which counsel states the evidence disclosed "passed through his hands." Appellant knew whether this substantial sum belonged to him or someone else. The burden of proof was upon him to divide the sum as alleged. He should not be permitted to remain silent and not insist he is financially unable to comply with the order. *Shelton v. Shelton*, 213 Ill. 492, was an appeal from an order of the appellate court which affirmed the order of the circuit court which found appellant guilty of contempt of court for failure to pay alimony in accordance with a decree of that court. In the course of its opinion

affirming the judgment of the appellate court, the Supreme Court said (p.496): "A showing that a divorced husband has failed to comply with the decree directing the payment of alimony to the former wife is prima facie evidence of contempt. Where he seeks to satisfy the court that his failure to pay is due entirely to his inability to pay, the burden is on him to establish that fact." See also *Dishinger v. Bon Air Catering, Inc.*, 336 Ill. App. 557, 569.

It is finally insisted that the court erred on November 9, 1956, in refusing to grant the defendant a continuance. The record discloses that the hearing was set for October 26, 1956. Appellant did not appear at that time but was represented by counsel. The testimony of the witnesses present was taken by agreement of counsel and the hearing continued until November 9, 1956. Appellant again did not appear. His counsel stated to the court that his client had informed his office that he could not be present. No formal application was made for a continuance, and if defendant desired a continuance in order that he might testify or on account of the absence of material evidence or for any other reason, Rule 14 of the Supreme Court outlines the procedure to be followed. Sub-paragraph 6 of this Rule is to the effect that no motion for the continuance of a cause made after the cause is reached for trial shall be heard unless a sufficient excuse is shown for the delay. (Ill. Rev. Stat. 1955, chap. 110, sec. (101.14 (6).) The trial court held there was no sufficient excuse shown and properly denied defendant's motion.

affirming the judgment of the appellate court, the Supreme Court said (p. 199): "A showing that a divorced husband has

failed to comply with the decree directing the payment of alimony to the former wife is prima facie evidence of contempt. Where he seeks to satisfy the court that his failure to pay is due entirely to his inability to pay, the burden is on him to establish that fact." See also *Dishinger v. Don Air Lines, Inc.*, 336 Ill. App. 511, 509.

It is finally insisted that the court erred on November 9, 1956, in refusing to grant the defendant a continuance. The record discloses that the hearing was set for October 26, 1956. Appellant did not appear at that time but was represented by counsel. The testimony of the witnesses present was taken by agreement of counsel and the hearing continued until November 9, 1956. Appellant again did not appear. His counsel stated to the court that his client had informed his office that he could not be present. No formal application was made for a continuance, and the defendant desired a continuance in order that he might testify or on account of the absence of material evidence or for any other reason. Rule 19 of the Supreme Court outlines the procedure to be followed. Subparagraph 6 of this Rule is to the effect that no reason for the continuance of a case shall be stated after the cause is reached for trial until he has been notified by the court that he is to appear for the trial. (Ill. Rev. Stat. 1955, Chap. 110, Sec. 101.3 (b)). The trial court held there was no sufficient excuse shown and properly denied defendant's motion.

Before appellee's time to file her briefs in this case had expired she filed her motion to strike the record, abstract and brief of appellant from the files, to hold appellant in contempt, and to dismiss this appeal. This motion was taken with the case. A so-called cross-motion "by way of objection to the motion of appellee" was filed by appellant, which was also taken with the case. Subsequently a brief was filed by appellee and a reply brief by appellant. We have considered the merits of the case, and the motion of appellee to strike the record, to hold appellant in contempt, and to dismiss the appeal is denied. This ruling disposes of appellant's so-called cross-motion.

The judgment order appealed from is affirmed.

Judgment order affirmed.

McNeal, J. Concur

Spivey, J. Concur

Before appeal is taken to file the record in this case and expires and filed for motion to strike the record.

Abstract and brief of appeal from the trial, to hold

appeal in contempt, and to dismiss this appeal. This

motion was taken with the case. A so-called cross-motion "by

way of objection to the motion of appeal" was filed by appeal-

ant, which was also taken with the case. Subsequently a brief

was filed by appellant and a reply brief by appellee. We have

considered the merits of the case, and the motion of appellee

to strike the record, to hold appellant in contempt, and to

dismiss the appeal is denied. This ruling disposes of appeal-

ant's so-called cross-motion.

The largest order appealed from is affirmed.

Subsequent order affirmed.

McNeal, J. Concur

Spivey, J. Concur

A

Agenda 4.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1957

Appeal from Circuit
Court of Kane County.

V5.

JOSEPHINE C. MINNEC,
Appellee.

In December of 1955, Josephine C. Minnec, the appellee herein and the defendant in the original suit, filed a petition to vacate a decree of divorce which was entered against her by default in the Kane County Circuit Court on August 11, 1949, as a result of a suit filed against her by John M. Minnec, her husband. Her petition alleged that she first learned of the decree for divorce in mid-November of 1955 and that she was not aware of having affixed her signature to the entry of appearance supposedly signed by her and that, if she did, it was obtained by fraud or deceit. The petition further alleged that

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the defendant was not a genuine resident of Kane County when he filed his complaint and that the decree, having been entered without jurisdiction, was of no force or effect.

Hearing on this petition and the defendant's answer thereto was held in January of 1956 and the trial judge entered an order on March 8th, 1956, finding: (1) The defendant had not established a residence in Kane County; (2) the plaintiff's appearance was obtained by the defendant through misrepresentation and fraud; and (3) the defendant perpetrated a fraud on the court in securing the decree entered on August 11, 1949. The order vacated the original decree and dismissed the complaint for want of jurisdiction.

Thereafter, the court denied the motions of the plaintiff for a re-trial and re-hearing on April 16th, 1956, and to vacate and set aside the order of March 8th, 1956, such latter order having been entered on May 21, 1956. On June 22, 1956, the court entered an order requiring the plaintiff to pay the defendant the sum of \$1800.00 costs and attorney's fees in defense of this appeal. All of these orders have been appealed from by the plaintiff.

A thorough examination of the record in this case reveals a long history of marital troubles between the parties.

The evidence discloses that the parties were married in 1936 and have two children who resided with them on West

Monroe Street in Chicago. On March 16, 1948, the husband severely beat his wife and she was hospitalized. On April 3, 1948, she filed a suit for divorce in the Circuit Court of Cook County. Three days later, Mr. Minnec filed a suit in the Superior Court of Cook County to annul the marriage. On June 28, 1948, both suits were dismissed, but two days before the dismissal order was entered, the husband filed another suit in the Superior Court of Cook County for divorce. A default decree of divorce was entered in the latter suit in August, 1948, and a copy of this default decree was delivered to Mrs. Minnec shortly thereafter. Mrs. Minnec then hired an attorney and this Superior Court decree of divorce was vacated and set aside and she was given leave to answer the complaint and to file a counterclaim, and the matter was pending in the Superior Court until June, 1949. On June 17, 1949, Mrs. Minnec, without her attorney, appeared with Mr. Minnec before Judge Sabath in the Superior Court and an order was entered which was filed and approved by Mr. and Mrs. Minnec that on the grounds of reconciliation the third divorce suit in Cook County was dismissed. John Minnec testified that on June 15, 1949, two days before the order of June 17, 1949, was entered in the Superior Court of Cook County, he had taken some clothes and moved into a room in Geneva, Kane County, Illinois. Mr. Minnec retained attorney Harry Hanson in Geneva, who prepared a complaint for divorce. Mr. Hanson prepared an appearance which Mr. Minnec took to Chicago and obtained the signature of Mrs. Minnec. At the time Mr. Minnec

[illegible]

alleged that he moved to Geneva, he took with him only clothing. His business records and other belongings were left in his apartment on West Monroe Street in Chicago. A default decree of divorce was entered by the Circuit Court of Kane County on August 11, 1949, and a transcript of the proceedings held on that date are part of the evidence in this case. Mr. Minnec then testified that in August, 1949, he returned to live in Chicago, that he took Mrs. Minnec and the two children back in the spring of 1950, but stated that Mrs. Minnec lived with him as a housekeeper. There seems to be little doubt but that the parties have resided under the same roof for most of the time since late 1949, or early 1950, although their exact relationship is not clear from the testimony. The plaintiff is a real estate broker, and a sub-divider. His original name was Giovanni Giuseppe Mario Minneci, and he is called by a combination of that original name. There is no doubt from the testimony that subsequent to the entry of the divorce decree by the Kane County Circuit Court, Mr. Minnec held Mrs. Minnec out as his wife on many occasions and that he even^{went} so far as to file joint income tax returns with her in several years subsequent to that time. Mrs. Minnec is also of foreign extraction with little or no formal education, and has a great deal of difficulty in understanding the English language. It seems clear that she signed whatever papers her husband told her to without questioning him as to what they were. His influence over her was substantial as evidenced by their relationship in the years following the

[illegible]

purported divorce in 1949. Within a few months, Mr. Minnec had persuaded her to resume living with him and over the subsequent years, made applications for loans jointly and filed joint income tax returns with her. It is obvious that Mrs. Minnec must have thought that she was still married to him, and Mr. Minnec certainly still held himself out as her husband. The relationship of the parties subsequent to the time the decree of divorce was rendered in 1949 makes little difference provided the Court had jurisdiction of the subject matter and parties when the decree was pronounced. The testimony of the plaintiff to the effect that he had actually established a residence in Kane County prior to the filing of the divorce complaint was very weak. The proprietor of the roominghouse where he said he rented a room did not remember him, and the woman with whom he allegedly went to Kane County to establish a business did not remember exactly when she made the trip, but testified that she was there for only a part of one day. The plaintiff contends, in this connection, that the testimony of Harry C. Hanson, who represented him in the original divorce decree, was improper and that the conversations which he had with Harry C. Hanson were privileged communications between attorney and client. We have examined the record carefully and have arrived at the conclusion that the substance of the testimony of attorney Hanson was as to the mechanics of the preparation of the complaint, and as to the fact that no summons was prepared, and as to the fact that an appearance was pre-

The following is a list of the names of the persons who have been
 elected to the office of the President of the United States, and
 the names of the persons who have been elected to the office of
 Vice-President of the United States, for the year 1892.

pared with a blank backing with no attorney's name indicated thereon to be signed by Mrs. Minnec, and as to the fact that no certified copy of the divorce decree was ever mailed to the defendant. In reference to each and every one of these facts and even beyond the scope of attorney Hanson's testimony, the plaintiff himself testified. Nothing was disclosed by the testimony of attorney Hanson that was not covered by the testimony of John M. Minnec. We find no testimony by attorney Hanson as to any privileged communications which should be excluded under the general rule of law, inasmuch as Mr. Minnec himself chose to testify as to the circumstances surrounding his employment of attorney Hanson. We can see no error on the part of the trial court in allowing attorney Hanson's testimony.

The finding of the Circuit Court of Kane County that Mr. Minnec perpetrated a fraud upon the court by obtaining a divorce decree is amply supported by the evidence. A judgment, order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void and may be attacked at any time or in any court either directly or collaterally. This rule of law has been set forth in numerous cases in Illinois and in other jurisdictions. It has further been held by our courts that the proper method is to proceed by petition to vacate the decree as was done in this case. In the case of *Anderson v.*

[illegible]

Anderson, 292 Ill. App. 421, the Court said, at page 428:

"As to appellants' contention that the only proper method of attacking the validity of the decree of divorce was by bill of review, it is sufficient to say that where a decree or judgment is void for want of jurisdiction of the person of the defendant, it is a nullity and may be expunged from the records of the court at any time. It is universally conceded that a judgment void for want of jurisdiction over the person of a defendant may be vacated on motion, irrespective of lapse of time. (Freeman on Judgments, 2d ed. sec. 98.) A court has power to vacate a judgment or decree at any time after expiration of the term at which it was rendered, where the court was without jurisdiction to enter such judgment or decree. (City of Chicago v. Nodack, 202 Ill. 257; Sherman & Ellis, Inc. v. Journal of Commerce, 259 Ill. App. 453; Feikert v. Wilson, 38 Minn. 341.)"

In a more recent case, entitled Meyer v. Meyer, 333 Ill. App. 450, a divorce was obtained in January, 1943; in July of 1944, the plaintiff, against whom a decree of divorce was entered, filed a petition in the Circuit Court, collaterally attacking the decree on the grounds that the court lacked jurisdiction of the subject matter. In the Appellate Court, the question as to the proper procedure to attack the decree of divorce was raised, the appellee therein alleging that the proper procedure was by a bill of review. The Appellate Court of the first district, on page 465, conclusively answered that question when it said:

"What has been said in discussing the foregoing proposition applies with equal force to the contention that a collateral attack cannot be made on a decree by petition after the expiration of 30 days,

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Illustration of the subject matter. In the previous issue, the

It is normal and healthy to experience negative feelings and to not always agree.

and that an original proceeding such as a bill of review or a bill in the nature of a bill of review to impeach the decree for fraud is required. Moreover, there are numerous decisions in this State where an attack on a decree more than 30 days after its entry in the original proceedings by petition has been sustained. In *Howard v. Howard*, 304 Ill. App. 637, defendant by verified motion sought to vacate a decree of divorce which had been entered more than 60 days prior thereto. Plaintiff, in whose favor the decree had been entered, moved to strike the motion but was overruled. The court then heard evidence and entered an order vacating the decree. It was held on appeal that no error was committed in vacating the decree more than 60 days after its entry, and the order was affirmed. In *Barnard v. Michael*, 392 Ill. 130, the court first stated the general rule that a judgment or decree cannot be set aside by the court in which it was entered after the expiration of 30 days, and then stated the exception to that rule to be 'that a court may entertain an application to vacate its void judgments or orders at any time and the thirty-day limitation does not apply. A judgment, order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void, and may be attacked at any time or in any court, either directly or collaterally.' Again, in *Sim v. Sim*, 247 Ill. App. 321, it was held to be 'hardly necessary to cite the decisions holding that, if the term of court at which a decree is regularly entered has elapsed, the court is without power at a subsequent term, on motion or petition, to vacate or modify said decree in any manner except as to matters of form or clerical errors and except where a decree is void for want of jurisdiction in the court entering the same * * *'. The exception which permits a court to vacate a prior order contemplates a case where the court had no jurisdiction of the subject matter or of the parties.'

See also Riddlesbarger v. Riddlesbarger, 324 Ill. App. 176, where the method of attacking jurisdiction for want of subject matter is fully discussed and numerous decisions cited."

In Barnard v. Michael, 392 Ill. 130, @ 135, the Court said:

"The rule now is that a judgment or decree cannot be set aside by the court in which it was entered after the expiration of thirty days following the entry thereof, with an exception to the rule which is, now the same as formerly, that a court may entertain an application to vacate its void judgments or orders at any time and the thirty-day limitation does not apply. A judgment, order or decree entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved, is void, and may be attacked at any time or in any court either directly or collaterally."

Whether the plaintiff was a resident of Kane County or whether defendant's appearance was knowingly and understandingly entered in that proceeding are questions of fact and the trial court's judgment should not be disturbed unless it is palpably wrong. From our thorough examination of the record, we feel that the trial court who heard the evidence as it came from the witness stand was entirely right in deciding the case the way it did and in awarding the defendant in the case attorney's fees to defend against this appeal. It is the^{further} contention of the plaintiff that the trial court was without jurisdiction to entertain an order for the payment of temporary alimony and attorney's fees, and he cites a number

DOI: 10.1002/eqe.1025

It is the consideration of the question whether the public good is further

To the Secretary of the Department of the Interior, Washington, D.C.

of cases for authority in support of his argument. None of the cases cited by the plaintiff are divorce or separate maintenance cases. Section 16 of the Divorce Act specifically authorizes the trial court to award such alimony and attorney's fees to defend against an appeal in divorce cases. In the case of Arndt v. Arndt, 331 Ill. App. 85, the suit was one for annulment. The trial court awarded the appellee alimony and attorney fees pending an appeal, and the Appellate Court said, at page 93:

"The general rule, universally recognized, is that a duly perfected appeal divests the trial court of further jurisdiction of the cause in which the appeal has been taken. This rule, however, is not without exceptions. As said in 3 Am. Jur., Appeal and Error, sec. 531, 'An appeal or error proceeding divests the trial court of jurisdiction over matters necessarily involved in the review proceeding only. The court has jurisdiction to hear and determine questions arising in proceedings independent of, and collateral to, the proceeding wherein the judgment or order appealed from was rendered. It does not, for example, deprive the trial court of jurisdiction to entertain a motion for * * * alimony and counsel fees pendente lite pending an appeal from a divorce decree.'"

In Ragland v. Ragland, 271 Ill. App. 518, a divorce proceeding, the Appellate Court said, at page 521:

"The statute creates, in cases of divorce, an exception to the general rule that with the consummation of an appeal, a court has no further authority to make orders in the case, as it, in direct terms, permits the court, after an appeal has been perfected from a decree awarding her a divorce, to grant and enforce an order requiring the husband to pay to his wife the reasonable and necessary cost of defending her cause upon a review of the case."

It is the duty of the court to see that the law is properly administered, and that the rights of the parties are properly protected. In the case of the *People v. [Name]*, the court found that the defendant was guilty of the crime charged, and that the punishment was properly imposed. The court also found that the defendant was entitled to a new trial, and that the judgment of the jury was set aside. The court then ordered a new trial, and the case was remanded to the jury for further consideration.

THE UNIVERSITY OF CHICAGO

The proceeding instituted in this case by Mr. Minnec is one for divorce. Section 16 of the Divorce Act applies, and the trial court had jurisdiction to entertain Mrs. Minnec's petition for alimony and attorneys' fees to defend against the appeal which was taken by Mr. Minnec.

We conclude that the trial court was correct in the orders entered in this cause.

Orders and Decrees affirmed.

The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the American Red Cross, for the year 1917-1918. The names are given in alphabetical order of the surnames.

ALBANY, N. Y. - Mr. J. B. Allen, President; Mr. W. H. Allen, Vice-President; Mr. J. B. Allen, Secretary; Mr. W. H. Allen, Treasurer; Mr. J. B. Allen, Chairman of the Committee on Finance; Mr. W. H. Allen, Chairman of the Committee on Publicity; Mr. J. B. Allen, Chairman of the Committee on Education; Mr. W. H. Allen, Chairman of the Committee on Legislation; Mr. J. B. Allen, Chairman of the Committee on International Relations; Mr. W. H. Allen, Chairman of the Committee on Medical and Surgical Supplies; Mr. J. B. Allen, Chairman of the Committee on Food and Clothing; Mr. W. H. Allen, Chairman of the Committee on Transportation; Mr. J. B. Allen, Chairman of the Committee on Miscellaneous Supplies; Mr. W. H. Allen, Chairman of the Committee on General Administration.

Abstract

General No. 17301

Agenda No. 11

IN THE

FILED

APPELLATE COURT OF ILLINOIS

AUG 12 1957

14 I.A.^{2d} 215

SECOND DISTRICT

PAUL V. WUNDER
Clerk Appellate Court Second District

February Term, A.D. 1957

VINCE PRITCHETT,

Plaintiff-Appellant,

vs.

GEORGE BICH,

Defendant-Appellee.

Appeal from the

Circuit Court of

Woodford County.

Deno, P. J.

This action was brought by the plaintiff to recover for injuries which he received when the automobile owned and driven by the defendant, in which the plaintiff was riding as a guest passenger of the defendant, left the paved portion of the highway it was traveling and collided with a tree. The issues made by the pleadings were submitted to a jury, resulting in a verdict and judgment in favor of the plaintiff for \$15,000.00. Upon motion of the defendant, that judgment was set aside and judgment notwithstanding the verdict was rendered in favor of the defendant and against the plaintiff in bar of the action. The record is before us for review upon appeal of the plaintiff.

Three witnesses testified upon the trial the plaintiff, the defendant, and the physician who attended the plaintiff after he was removed to St. Joseph's Hospital in Bloomington.

following the accident. There is no conflict in the evidence, and it discloses that the defendant, forty-seven years of age at the time of the accident, lived in Pontiac and on September 19, 1953, was driving a 1949 Chevrolet car. On this day he met the plaintiff in a park at Gridley, Illinois. How long the parties had known each other does not appear from the evidence, but shortly after four o'clock on that afternoon, defendant invited the plaintiff to accompany him in his car and they left Gridley together, defendant driving his car and plaintiff riding in the front seat. They proceeded to El Paso, leaving there about 5:30 p.m. and drove north on Route 51 to Minonk, where they arrived about six o'clock and remained there until 8:30 p.m. When they left Minonk, they proceeded north on Route 51 intending to go to Wenona. After proceeding for about four miles north, however, they changed their minds, and the defendant turned his car around and proceeded south along the same route. When the car had traveled two and one half miles south and had arrived at a point about one and one half miles north of Minonk, the road curves east. Defendant testified that he observed the curve about ten feet away and applied his brakes. His lights were in good order, and he was driving on dim. At this time he observed a car approaching him from the south in its proper traffic lane, and he estimated that this car at that time was 230 feet south of him; that the lights of the oncoming car "kind of dimmed" his eyes and he didn't realize the curve was so close. As abstracted, the defendant then testified: "I was driving around fifty-five. I know I slackened up some because I had the brakes on and tried to make the turn but couldn't make it. It couldn't have been too long before the car left the highway. Have no estimate. First thing I noticed

when the car left the highway was that I bumped about four inches where the hard road drops and headed over about a five foot embankment, not enough for a car to park on, the car tipped over, went down, hit a tree, travelling fifty-five like I generally do."

The plaintiff and defendant both testified that they were talking as they proceeded along the highway, and plaintiff's testimony was that he didn't notice any trouble with defendant's driving from the time they left Gridley; that when they turned around and were proceeding south, the road curved. "We were travelling straight," continued the plaintiff, "then got to the curve, there are guard posts, about ten, twelve or fifteen feet apart with white tops and black bottoms, we came around there, we didn't make the curve, broke off a couple of posts went in the ditch and turned over and landed up against a tree. Going about 50 miles an hour, maybe a little better at that time..... I don't remember noticing the curve until the accident. He was doing the driving, I wasn't paying no attention. We were talking, I guess, like we always do, didn't pay much attention to the road. Don't remember another car proceeding toward me. Didn't notice any evidence of the car proceeding across the center line of the highway or off on the shoulder at any other time. As far as I could tell Mr. Rich properly operated the car. He had control at all times up to and immediately preceding the time when the car left the highway. Didn't caution him about his driving. ^{Didn't} ~~didn't~~ caution him at the time we approached the curve, because didn't have time. It happened awful quick."

From the foregoing facts, counsel for appellee
insists that the jury properly found that appellee was guilty
of willful and wanton conduct and argues that because he
defendant easily negotiated this curve without difficulty just
a short time before he was proceeding in a southerly direc-
tion there is no apparent reason why plaintiff should be
apprehensive. Why defendant would not be able to negotiate
the curve with equal ease as he proceeded in a southerly direc-
tion. In support of this contention, counsel cite and rely
upon the recent case of *Ananda v. Davis*, 8 Ill. 2d 593. The
factual situation in the *Ananda* case is entirely different
than the situation in the instant case. In the *Ananda* case,
the white car was approaching four vehicles proceeding in the
same direction, and the driver of the white car started to pass
all of them on the left. The highway was wet, and it had been
raining. There was evidence that stop lights were flashing on
some of the cars in the line of traffic, defendant's sister was
uninjured, and the guest passenger warned the driver that the
lead vehicle was going to turn and its stop lights were burning
and it was slowing down. There was no evidence in the *Ananda*
case that the defendant reduced his speed or gave any warning
after passing the first vehicle in the line of traffic. The
evidence was that the lead driver increased his speed from
thirty-three to fifty-five miles per hour, and when the lead
vehicle turned to the left, a collision occurred.

In the instant case, the road was clear with the
exception of a car approaching some 230 feet in front of the
white car. The rate of speed when the traveling car in
question. Defendant observed the curve about 200 feet west of the road.

car speed, tried to make the turn, but didn't realize it was
so close and was unable to do so. We agree with the conclusion
arrived at by the trial court that there is in this record a
conspicuous lack of proof of any consciousness on the part of
defendant that his conduct would naturally and probably result
in injury to anyone. There is also a conspicuous lack of proof
of any intentional disregard of a known duty on the part of
the defendant, and there is no proof of any absence of care on
his part for the life, person, or property of others which
exhibits a conscious or reckless indifference to consequences.
Furthermore, plaintiff was in the front seat beside his host.
They were talking, and the car was being driven in its proper
lane of traffic at a speed and in a manner acceptable to the
guest. If the driver was guilty of wilful and wanton misconduct
under all the circumstances shown by this record, defendant was
likewise guilty of such conduct as would bar his recovery
(Willingroth v. Maddox, 281 Ill. App. 480).

It is the law in this state that before one may be
found guilty of wilful or wanton conduct, it must be shown that
he was conscious from his knowledge of existing conditions that
the injury would likely or probably result from his conduct and
that with reckless indifference to consequences he consciously
and intentionally did some wrongful act or omitted some known
duty which produced the injurious results (Bartolucci v. Fellini,
382 Ill. 168; Jacobs v. Illinois Nat. Bank and Trust Co., 343
Ill. App. 30; Clark v. Hasselquist, 304 Ill. App. 41; Clarke v.
Stachek, 384 Ill. 564). There is no evidence in this record
sustaining the finding of the jury, and the trial court did not
err in setting it aside and rendering the judgment appealed from.

The judgment of the Circuit Court of Woodford County
is, therefore, affirmed.

Crow, J. Concur.

Judgment affirmed.

Abstract

Gen. No. 10994

Agenda 6

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1957

FILED

AUG 12 1957

PAUL V. WUNDER
Clerk Appellate Court Second District

HENRIETTA WHITE, Administrator of
the Estate of GEORGE L. WHITE,
Deceased,

Appellant,

-vs-

THE ILLINOIS CENTRAL RAILROAD COMPANY,
a corporation,

Appellee.

14 I.A.^{2d} 216

Appeal from

Circuit Court

Stephenson County.

CROW, J.

This is an appeal by the plaintiff, Henrietta White, administrator of the estate of George L. White, deceased, from a judgment for the defendant, The Illinois Central Railroad Company, entered upon and after the allowance of the defendant's motion for a directed verdict at the close of the plaintiff's case, in a suit for the alleged wrongful death of the plaintiff's intestate, George L. White, resulting from a collision September 21, 1955, shortly before 8:40 a.m., between a freight train of the defendant proceeding southerly on its tracks and a truck operated by White proceeding westerly on the South Freeport Blacktop Road at their crossing in the open country south of Freeport.

The pleadings consist of the complaint and the answer. Count 1 of the complaint alleges, in substance, that the plaintiff is the duly qualified and acting Administrator of the Estate of George L. White, deceased; on September 21, 1955, defendant was operating a



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...train of cars of the ...
...public highway known as the South Freeport Blackton Road about 42
...of Freeport, at the same time her intestate was driving
...westerly direction on the South Freeport
...towards that public railroad crossing; her intestate
...thereafter acted were in the exercise of ...
...of one or more of the following negligent acts
or omissions:

- (a) negligently operated said train in such a manner
as to cause the same to strike her intestate's truck;
- (b) operated said train at a speed in excess of what
was reasonable and proper, taking into consideration
the day, time, location of the crossing, and amount of
traffic upon the highway;
- (c) failed to signal the approach of said train to
such persons rightfully on the highway;
- (d) failed to maintain adequate signals at the public
crossing to warn persons lawfully on the highway of the
approach of the train;
- (e) allowed the right of way to grow up in brush and
weeds so that its servants could not see approaching
traffic lawfully approaching on the highway;
- (f) allowed an obstructions to exist at such a height
as to obscure the vision of the operators of its loco-
motive so as to render them unable to observe the
approach of motor vehicles lawfully on the highway;
- (g) failed to provide adequate clearing space in the
path of its locomotive so that its servants were unable
to see approaching traffic on the public highway;

...of one or more of these alleged negligent acts or omissions,
the engine and train ran against and struck her intestate's truck
and as the proximate result thereof threw him therefrom upon the
ground, seriously injuring him, from which injuries he died on September
27, 1935; the action was commenced within one year from his death;
and George L. White, her intestate, left surviving him his wife,

The witnesses for the plaintiffs were: Barry Harlin, a commercial photographer, who took certain photographs of the black boxer, Mervin, and took certain photographs of the white boxer, Mike Tyson, a lawyer and wife of the boxer George J. Foreman, who

George L. White, at some distance, in another truck just prior to this collision; Emma Woodard, a cousin of the decedent White; Barney White, father of the decedent, Dr. O. J. Giovanelli, the attending physician and surgeon; Dalen Reed, a service man who towed the White truck into a garage afterwards; Alvin Stine, a deputy sheriff, who investigated the scene afterwards; Henrietta White, the widow and administrator plaintiff, and, after the reopening of the plaintiff's case, Howard M. Shephard, the brakeman on the train, and Harley B. Austin, the fireman. There are seven photographs of the general scene, taken about a month after the accident, and three photographs of the White truck in evidence; a copy of the plaintiff's letters of administration is in evidence, and it was stipulated the decedent's life expectancy was 27.78 years, and the value of the White truck was \$250.00 and its salvage brought \$135.00.

The plaintiff's evidence, considered, with all reasonable inferences and intendments from it, in its most favorable aspect to the plaintiff, may be summarized, so far as material, substantially as follows:

George L. White sustained injuries as a result of this truck-rail collision on September 21, 1955, some time prior to 8:00 a.m., at this Illinois Central Railroad crossing with the South Freeport Blacktop Road, about $4\frac{1}{2}$ miles south of Freeport. The road and railroad are at right angles to each other at the crossing, the road extending east-west, and the railroad north-south. The area is open country, not congested. He died as a result of such injuries on September 27, 1955, without regaining consciousness. At the time of his death, he was 36 years and 12 days old. His life expectancy was 27.78 years. He left surviving his widow and four minor children between the ages of $1\frac{1}{2}$ and 13 years. Prior to the time of his injuries,

in good physical condition. His eyesight and hearing were good. He attended to his work well. He didn't drink. He was an excellent leveler and leveling dirt and gravel. He was the sole support of his wife and children. His earnings were approximately \$1000.00 a year. He owned two trucks and a tractor which he used in his business. These trucks were 1947 and 1948 Chevrolet trucks. On September 21, 1954, he was driving the 1947 Chevrolet truck. It had a S license which indicated a 4 to 5 ton load. The truck had been up about eight or ten days prior to September 21, 1954. They were in good operating condition. The windshield wipers functioned. There were no cracks or broken parts in the windshield. The truck had been through a safety inspection sometime during the preceding five months.

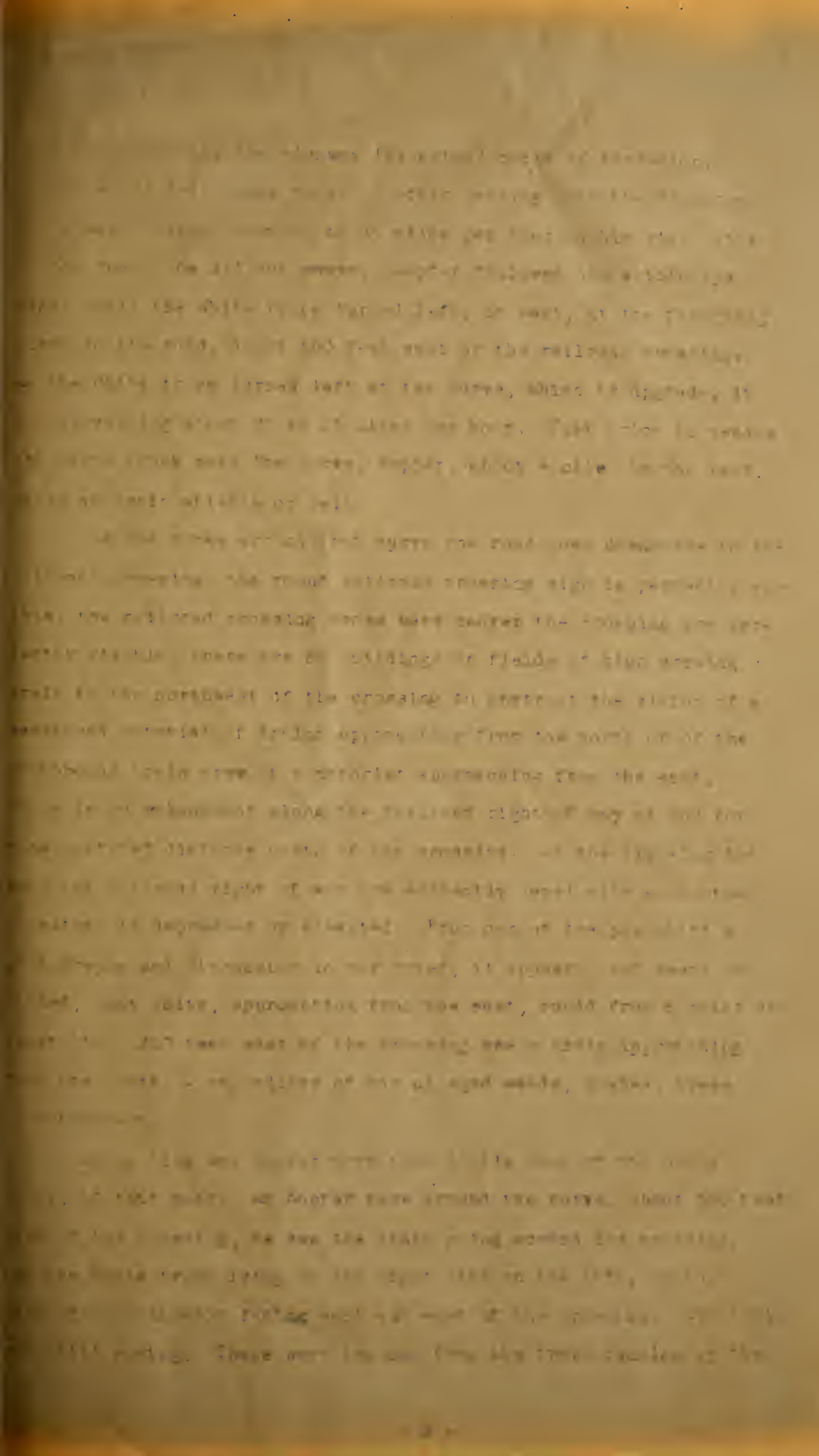
The South Freeport Blacktop Road upon which George L. White was traveling, proceeds in a generally north-south direction between Freeport and Forrester. It connects with Illinois State Highway 31 about 15 miles north of Forrester. It is an alternate route from Freeport to Forrester and Deputy Sheriff Stice said it is heavily travelled. He had never realized the amount of traffic on it until the day of this accident. He thought he gave no details as to why he concluded it was heavily travelled. The terrain is somewhat hilly. The Blacktop turns west at practically a right angle approximately 20 feet east of the crossing where this collision occurred and at that crossing it runs in a west-east direction. About 100 feet west of that crossing, or about 100 feet east of the crossing, there is a "Railroad Crossing" sign. About 370 feet further west toward the crossing is a railroad crossing where there is 41 feet wide of the tracks. There are no flashers or warning signs. Nor are there any gates or a watchman.

There is a high line or tall pole at the east edge of the

right of way of the railroad just north of the crossing. A wire fence extends northerly therefrom on the east edge of the right of way. There are some weeds and bushes to the west of the wire fence, but there is no evidence as to how high in feet or inches they were or how dense they were. As nearly as we can perceive from some of the photographs most of the weeds and bushes for some distance north of the crossing do not appear to be any higher than the fence, which seems to be just an ordinary farm field fence, and do not appear particularly dense. White's father, who had driven over the road with him lots of times said he'd observed the weeds and bushes, but he did not say they constituted any obstruction to vision by anyone or anything. He said, in fact, he had walked north and south up and down the railroad tracks quite a ways and that one could see a train quite a ways from the south.

There is also an embankment beginning some unstated distance north of the crossing which had weeds on it. Apparently the railroad right of way had been cut down to a level grade through a slight rise in the terrain. The witness Kupfer, following White in another track, makes the general comment that there was a high embankment to the north which had weeds on it, and something in the field which cut off your view from seeing a train, without describing, however, what he meant by "high", or what was in the field. As nearly as we can ascertain from some of the photographs the cut for the railroad right of way in that slight rise north of the crossing was rather shallow and the embankment was not particularly high, at least for a considerable distance north of the crossing, and the cut gradually becomes deeper and the embankment less high as they proceed south to the crossing, and for some unstated distance north of the crossing there was no cut and no embankment at all.

As the witness walked down the tracks from a point about 300 feet west of the crossing, Deputy Sheriff Oline said there is some light in the night, as well as bushes and small trees, and he walked west to the crossing before he could see to the left very much. It was very obstructed, he commented generally. That, of course, is a particularly persuasive evidence of what a train crew sitting in the cab of an engine, on rails resting on cross ties instead of standing or walking on the ground, would or could not see of an oncoming 4 to 6 ton truck approaching from the left or east, or what the driver of such a truck could see or not see of the oncoming engine and train, especially when, as hereinafter referred to, the road at the point was 300 feet west of the crossing where it turns left or west is apparently several feet higher than it is at the crossing and goes gradually down grade to the crossing. There is no evidence, in feet or inches, of how high the engine was or how far above the ground was the eye level of the train crew, but it has been said to be a matter of common knowledge that an engine is about 15 feet high. SPENCER et al. v. CHICAGO etc. R.R. CO. (1940) 100, 497, 237, and as that case says the top of a train is about 15 feet above the tracks. MOUNT v. N. C. CO. and ST. L. R.R. CO. (1944) 100, 497, 237. Nor is there any evidence, in feet or inches, of how far above the ground was or how far above the ground was his eye level. The photographs of the truck would evidently indicate that it, or at least the driver's cab part, stands several feet above ground level and higher than an ordinary modern passenger car, and that the driver's eye level, comparatively, would be several feet above ground level and probably higher than that of a driver in an ordinary old-fashioned passenger car. One past comment is that the sight range of a car in a passenger automobile is about 4 feet above the ground. MOUNT v.



The Court was not satisfied that the evidence presented was sufficient to establish the defendant's guilt beyond a reasonable doubt. The Court was particularly impressed by the fact that the defendant had been acquitted of the same offense in a previous trial. The Court was also impressed by the fact that the defendant had been acquitted of the same offense in a previous trial. The Court was also impressed by the fact that the defendant had been acquitted of the same offense in a previous trial.

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The Court was not satisfied that the evidence presented was sufficient to establish the defendant's guilt beyond a reasonable doubt. The Court was particularly impressed by the fact that the defendant had been acquitted of the same offense in a previous trial. The Court was also impressed by the fact that the defendant had been acquitted of the same offense in a previous trial. The Court was also impressed by the fact that the defendant had been acquitted of the same offense in a previous trial.

does not say the whistle was not sounded, and his testimony that he heard no whistle or bell is merely negative in character and does not, under the circumstances, raise or tend to raise an issue of fact. It has no probative force in the absence of evidence that he was in such proximity that he could have heard the sound had it been given and that his attitude of attention was such that if either had been sounded such would have attracted his attention: PROVENZANO v. I. C. R.R. CO. (1934) 357 Ill. 192; TRUMBO et al. v. C. B. and Q. R.R. CO. (1945) 389 Ill. 213; BERG etc. v. N.Y.C. R.R. CO., supra. The only positive evidence of the plaintiff is that the whistle was blowing. To the extent, if at all, the evidence of Kupfer and the brakeman and fireman are in conflict, the conflict is solely of the plaintiff's own making, - they were all plaintiff's witnesses, - and it would be incongruous to say that such a self-created conflict in the plaintiff's own evidence, if it be such, creates an issue of fact for the jury. To whatever extent, if at all, all of that plaintiff's evidence conflicts, the plaintiff's proof again leaves a choice between two views, both equally compatible with the evidence, and, again, the defendant's liability cannot be permitted to rest upon speculation, conjecture, or choosing between such views both presented by the plaintiff. The plaintiff vouched for all those witnesses and we are not at liberty to consider the testimony of only one of them and disregard the others.

It is next alleged the defendant failed to maintain adequate signals at this crossing to warn persons lawfully on the highway of the approach of the train. About 400 feet east of the crossing is a round railroad crossing sign. About 41 feet east of the crossing is a railroad crossing cross bar. Both are perfectly visible from the house about 500 feet east of the crossing. There are no flashers,

By the Union Pacific R. Co. witness. By necessity, the train
was stopped, reaching the crossing at about the same time, it was not
the duty of the defendant to stop the train, but the duty of White to
look, listen, and if the circumstances required, to stop. The error
was not required to stop or try to stop until it became apparent
White had the right, or would not yield, or would not yield, its sig-
nal, or the train was actually there. In White's view was at all
times, and he knew the road and crossing, as he did, he must exercise even
greater care. The plaintiff, recognizing that White apparently was
coming from the south, from the grade 100 feet east and towards the
crossing, downgrade, in a large truck, with a heavy load, or was over-
haul, and that he could (and presumably did) see the train at least
100-200 feet east, says he was slowing down, signaling, and trying to
protect himself. Such was probably the case, but that hardly leads
to the conclusion of ultimate fact that he was in the exercise of
due care and caution.

Authorities of the plaintiff cited are Union Pacific R. Co. v. MFP (1905) 122 Ill. App. 181; Zirano v. Union Pac. (1916) 121 Ill. App. 191; Union Pac. R. Co. v. Chicago & N. W. Ry. Co. (1905) 120 Ill. App. 191; Union Pac. R. Co. v. Chicago & N. W. Ry. Co. (1905) 120 Ill. App. 191; Union Pac. R. Co. v. Chicago & N. W. Ry. Co. (1905) 120 Ill. App. 191; Union Pac. R. Co. v. Chicago & N. W. Ry. Co. (1905) 120 Ill. App. 191. None involved facts like or even closely resembling those of the instant case, and except for statements of certain general principles, as to which there can be no difference of opinion, they are not helpful.

Considering all of the plaintiff's evidence, with its reason-
able inferences and inferences most favorable to the plaintiff,
and the presumption being in favor of the action of the trial court
in admitting this evidence, the plaintiff has not overcome that presump-
tion and has not presented competent evidence from which the jury could

reasonably find for her. There is a total failure to prove negligence and freedom from contributory negligence. The jury could not, acting reasonably in the eyes of the law, have returned a verdict for the plaintiff. Of the cases we've referred to, C. P. and C. P. & C. P. CO. v. DAKES-ELL et al., supra, MOUDY v. N. Y. C. and ST. L. R.R. CO., supra, and SEANSON v. C. M. ST. P. and P. R.R. CO., supra, are as close as any on their facts to the case at bar, and they reach the same conclusion we do here.

As to the plaintiff's last contention that the Court erred in weighing the evidence in considering the defendant's motion, - an examination of the weight of the evidence to determine its preponderance is, of course, not permissible upon a motion for a directed verdict, but we find nothing to indicate the Court did so. The plaintiff's evidence, - and it must be remembered that all of the evidence was the plaintiff's, - necessarily had to be carefully considered and analyzed, however, and that is what the Court did and what we have tried to do. The trial court's observations were nothing more than fair comment on the evidence. There were all plaintiff's witnesses. She vouched for them all. Neither the trial court nor we can consider the evidence of only one or more and disregard that of others. To the extent her own evidence leaves at certain points a choice between two views, both equally compatible with some of her evidence, liability cannot be permitted to rest upon choosing between the views she presents. She can hardly expect the trial court or us to say which of her witnesses is most truthful, - they're all supposed to be telling the truth, and she'll have to accept responsibility for what they all said, not just for what some of them said. Whatever, if any, conflicts there may be in their testimony they are conflicts self created by the plaintiff. In HUGHES v. WABASH R.R. CO. (1950) 342 Ill. App.

For further information, please contact:

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Abstract

A

1st DIVISION

Gen. No. 11069

Abstract

Agenda 15

14 I.A.^{2d} 217

IN THE

FILED APPELLATE COURT OF ILLINOIS

AUG 14 1957

SECOND DISTRICT
(First Division)

PAUL V. WUNDER
Clerk Appellate Court Second District

MAY TERM, A. D. 1957

FRED A. SCHLEIFER, WINIFRED C.
SCHLEIFER, and VILLAGE of EAST
DUNDEE, a municipal corporation,
Plaintiffs,

vs.

LEONARD BESINGER and HENRIETTA
BESINGER,
Defendants,

and

HENRIETTA BESINGER and LEONARD
W. BESINGER,
Counter-Plaintiffs and Appellants,

vs.

VILLAGE of EAST DUNDEE, a munic-
ipal corporation; WILLIAM BREMER
as President of the Board of
Trustees of the Village of East
Dundee and individually; MELVIN
C. FRITZ, as Secretary of the
Board of Trustees of the Village
of East Dundee, as Clerk of the
Village of East Dundee, and in-
dividually; RAYMOND BUHROW,
CHARLES MEIER, WILLIAM HOLTZ,
EARL JOHNSON, WALTER UNRUH and
WILLIAM BARTELS as Trustees of
the Board of Trustees of the
Village of East Dundee and as
individuals; MALCOLM C. McCUAIG,
FRED A. SCHLEIFER, and WINIFRED
C. SCHLEIFER,
Counter-Defendants and Appellees,

Appeal from the
Circuit Court of
Kane County.

A 14

Abstract 1st Division

Gen. No. 11369 Abstract

14 I.A. 217

FILED IN THE

AUG 14 1957
 PAUL V. WUNDER
 Clerk Appellate Court Second District

<p>Appeal from the Circuit Court of Kane County.</p>	<p>FRANK A. SCHULTZ, Plaintiff, SCHULTZ, and VILLAGE of EAST DUNDÉE, a municipal corporation, Defendants, vs. LEONARD SCHULTZ and MARILYN SCHULTZ, Defendants, and MARILYN SCHULTZ and LEONARD SCHULTZ, Counter-Plaintiffs and Appellants, vs. VILLAGE of EAST DUNDÉE, a mu- nicipal corporation; ALLEN SCHULTZ as President of the Board of Trustees of the Village of East Dundee and individually; ALLEN C. WHITE, as Secretary of the Board of Trustees of the Village of East Dundee, as Clerk of the Village of East Dundee, and in- dividually; LEONARD SCHULTZ, CHARLES WHITE, ALLEN WHITE, ALLEN SCHULTZ, ALLEN SCHULTZ and WILLIAM SCHULTZ as Trustees of the Board of Trustees of the Village of East Dundee and as individuals; MARILYN SCHULTZ, FRANK A. SCHULTZ, and LEONARD C. SCHULTZ, Counter-Defendants and Appellants.</p>
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SPIVEY--J.

The sole question presented is whether or not the trial court erred in allowing appellees' motions to strike appellants' counterclaim.

On February 8, 1955, Fred A. Schleifer, Winifred C. Schleifer, and the Village of East Dundee, a municipal corporation, filed their complaint for injunction against Leonard Besinger and National Bank of Austin, as Trustee, praying that the defendants be restrained from permitting surface waters to flow upon and over the lands of plaintiffs, Fred A. Schleifer and Winifred C. Schleifer, and the street known as Ashland Avenue of the plaintiff, Village of East Dundee, and from entering upon their respective lands and street. Plaintiffs also sought damages.

The same plaintiffs, having first obtained leave of court, filed their amended complaint for injunction and damages making Leonard Besinger and Henrietta Besinger parties defendant on March 30, 1955. The amended complaint prayed for the identical relief as prayed in the original complaint.

Leonard Besinger and Henrietta Besinger filed their answer to the amended complaint which, in effect, was a general denial.

On March 2, 1956, after having first obtained leave of court, Fred A. Schleifer and Winifred C. Schleifer filed a second amended complaint against Leonard Besinger and Henrietta Besinger. In their second amended complaint

The sole question presented is whether or not the trial court erred in allowing appellants' motion to dismiss appellants' counterclaim.

On February 8, 1955, Fred A. Schindler, residing in O. Schindler, and the Village of Lake Geneva, a municipal corporation, filed their complaint for damages against Leonard Bader and Howard Bader in Circuit Court of Lake Geneva, Wisconsin. The complaint alleged that the defendants had wrongfully and maliciously placed upon the front lawn of the property known as Schindler Avenue of the plaintiff, Village of Lake Geneva, and from encroaching upon their respective lots and street. Plaintiffs also sought damages.

The same plaintiffs, seeking their damages from the court, filed their amended complaint for damages and damages seeking Leonard Bader and Howard Bader. Parties defendant on March 10, 1955. The amended complaint prayed for the identical relief as prayed in the original complaint.

Leonard Bader and Howard Bader answered their original answer to the amended complaint filed in March, 1955, and a general denial.

On March 1, 1955, after having first obtained leave of court, Fred A. Schindler and the Village of Lake Geneva moved for summary judgment against Leonard Bader and Howard Bader. In their motion, amended complaint

plaintiffs alleged ownership of lands (the same lands in which ownership was alleged in the complaint and amended complaint) which lie on the east and west sides of what was formerly known as Ashland Avenue. They also allege that on September 6, 1955, the Village of East Dundee, by ordinance, had vacated (together with other streets not in question) that portion of Ashland Avenue which runs in front of the lands of the plaintiffs, as alleged in the complaint, and that portion of Ashland Avenue by virtue thereof reverted to the plaintiffs.

The National Bank of Austin, as Trustee, on May 10, 1954, deeded to the defendants as joint tenants the land, the use of which the plaintiffs now complain. The complaint stated that defendants, in building a road wrongfully entered upon plaintiffs' lands by causing water to flow upon and over plaintiffs' lands resulting in soil erosion and the depositing of dirt and gravel, on the lands of plaintiffs to their damage; that plaintiffs placed barriers at the north end of Ashland Avenue after the Village adopted the vacating ordinance and that defendants tore down the barriers and trespassed on plaintiffs' property by continuing to use the vacated portion of the street. The defendants were said not to be residents of the Village of East Dundee.

Plaintiffs prayed the identical relief as prayed in their original and amended complaints, omitting therefrom reference to the street of the city of East Dundee called Ashland Avenue.

Thereafter defendants, by petition, obtained leave of court to file a counterclaim making additional parties counter-defendant.

[illegible][illegible]

Reference to the report of the day of the same date.

Defendants, in answering the second amended complaint, admit they are not residents of the Village and admit the building of a roadway, but deny the alleged damage to plaintiffs' property. They further admit the passage of the vacating ordinance but deny that it has any force and effect as to them and contend that the ordinance is unconstitutional.

Defendants, in their counterclaim containing four counts, name in each instance as counter-defendants, Village of East Dundee, a municipal corporation; William Bremer as President of the Board of Trustees of the Village of East Dundee; and individually; Melvin C. Fritz, as Secretary of the Board of Trustees of the Village of East Dundee, and as Clerk of the Village of East Dundee, and individually; Raymond Buhrow, Charles Meier, William Holtz, Earl Johnson, Walter Unruh, and William Bartel, as Trustees of the Board of Trustees of the Village of East Dundee, and as individuals; Malcolm C. McCuaig; Fred A. Schleifer; and Winifred C. Schleifer.

Count One of the counterclaim is an action in equity by Henrietta Besinger alleging ownership in joint tenancy with her husband, Leonard W. Besinger, of property abutting the north end of Ashland Avenue from which property a driveway was constructed connecting with the extreme north end of Ashland Avenue, and that the driveway and street were used as a means of ingress and egress to the residence situated on that property.

The vacating ordinance is alleged and by virtue of the reverter provision thereof the defendants, Fred A.

Schleifer and Winifred D. Schleifer, have asserted dominion over that portion of Ashland Avenue covered by the ordinance, and is depriving plaintiff of her use and enjoyment of the street. Plaintiff alleges that the ordinance is unconstitutional and prays that the Village of East Dundee and its officers, agents, and servants, Fred A. Schleifer and Winifred D. Schleifer, be restrained from interfering with her right of ingress and egress to her property over Ashland Avenue and that the ordinance be declared unconstitutional and void insofar as it applies to plaintiff's property, and for general relief.

Count Two of the counterclaim is an action at law for damages by Henrietta Besinger against the Village of East Dundee for damaging her property without just compensation, if the vacating ordinance be constitutional.

Count Three of the counterclaim is an action at law for damages by Leonard W. Besinger against the Village of East Dundee. Counter-plaintiff alleges a beneficial interest in other lands which will be damaged without just compensation as a result of the adoption of the vacating ordinance, if the same be constitutional.

Count Four of the counterclaim prays damages against all of the counter-defendants collectively and separately in their respective corporate capacities and individually, except the Village of East Dundee, by the counter-plaintiffs, alleging a conspiracy. This count contains seventy-seven paragraphs.

Briefly abstracted it recites all of the proceedings in the instant case. Malcolm C. McCuaig, the then and now Village Attorney for the Village of East Dundee, is

and agree to her property and the same shall be
ordinance be declared unconstitutional and void
in applying to the property, and for the reason that

It is the feeling of the Commission that the Commission should be authorized to conduct a study of the problem of the distribution of the population of the United States, and to report thereon to the President and the Congress.

[illegible]

During the year of the investigation, the following persons were interviewed:

now Vito is working for the FBI as a detective. He is also a member of the FBI and is working for the FBI as a detective. He is also a member of the FBI and is working for the FBI as a detective.

charged with actually representing the plaintiffs, although not of record; that plaintiffs and their attorney, McCuaig, using McCuaig's official position, conspired with the other counter-defendants in adopting the vacating ordinance without compensation to the Village to compel the counter-plaintiffs to acquiesce in their demands, and to diminish the value of counter-plaintiff's lands.

On May 11, 1956, Fred A. Schleifer and Winifred C.

Schleifer filed their motion to strike the counterclaim, stating; (1) that at the time of the filing of the second amended complaint the Village of East Dundee by virtue of having adopted the vacating ordinance has no further interest in the case, was not made a party, and is not a proper party to the second amended complaint; (2) that the parties to the counterclaim are not the same parties set out in the second amended complaint and the subject matter does not grow out of the same transactions or occurrence; (3) that the validity of the ordinance cannot be questioned by the plaintiffs due to laches; (4) that plaintiffs' action is in equity and the defendants' counterclaim is in law; (5) that the President of the Board of Trustees and the Clerk and Trustees are not proper parties in any cause of action that counter-plaintiffs might have on account of the passage of the vacating ordinance; (6) that Henrietta Besinger, one of the joint tenants, cannot individually enjoin the interference with her right of ingress and egress and asks that the ordinance be declared unconstitutional; (7) that Count Two does not state a cause of action, and more particularly

the value of country-landlord's lands.

[illegible]

does not state a cause of action as to the Schleifers; (8) that the lands of Leonard W. Besinger described in Count Three were not the lands described in the original complaint or amendments thereto, and that the action is in law; (9) that Count Four improperly makes Malcolm C. McCuaig a party defendant, he having no interest in the subject matter of the second amended complaint; (10) that the allegations in Count Four do not encompass the same issues, relief sought, parties, and property involved in the second amended complaint, and is an action at law; (11) that the counter plaintiffs have no cause of action for damages against any of the counter-defendants, except by virtue of the vacating ordinance, if valid; and, (12) that Count Four is without foundation in law, and particularly against Fred A. Schleifer and Winifred C. Schleifer.

On May 18, 1956, the Village of East Dundee, William Bremer, Melvin C. Fritz, Raymond Buhrow, Charles Meier, William Holtz, Earl Johnson, Walter Unruh, and William Bartel, by Malcolm C. McCuaig, their attorney, and Malcolm C. McCuaig, per se, filed their motion to strike the counterclaim alleging almost the identical grounds as stated in the motion filed by Fred A. Schleifer and Winifred C. Schleifer.

Section 45 of the Civil Practice Act requires motions directed to pleadings to specifically point out defects and ask such relief as the nature of the defects may make appropriate.

Counter-defendants' motions contain twelve grounds, and except in a few instances are by each counter-defendant

directed to each count of the counterclaim without respect to the allegations or the relief prayed. Counter-defendants, William Bremer, Melvin C. Fritz, Raymond Buhrow, Charles Meier, William Holtz, Earl Johnson, Walter Unruh, and William Bartel were complained of both in their respective official capacities and as individuals. However, their motion to strike was filed as individuals only.

[1] This style of pleading complicates the issues and is a burden to the trial court rather than a help in reading the issue or issues. Such pleadings have been condemned. Cottrell v. Gerson, 296 Ill. App. 412.

Appellants contend that the trial court's order allowing their petition to file their counterclaim and the bringing in of additional parties counter-defendants is authorized by the Civil Practice Act, and cite Johnson v. Moon, 3 Ill. 2nd 561; People f/u/o Jones, et al vs. Leviton, 327 Ill. App. 309; Abbott, et al v. Loving, et al, 303 Ill. 154, in opposition to defendants' motions to dismiss.

In our opinion the Johnson case is controlling in the instant case. In that case the court, after reviewing several sections of the Civil Practice Act, concludes:

"Joinder of multiple plaintiffs and of multiple defendants now depends broadly upon the assertion of a right to relief, or a liability, arising out of the same transaction or series of transactions and the existence of a common question of law or fact. New parties may be brought in when their presence is necessary for a complete determination of the controversy or where they have an interest or title which the judgment may affect. At any time before

to the effect that the petitioners are entitled to relief from the tax imposed by the Act of March 3, 1878, inasmuch as the same is unconstitutional and void. The petitioners claim that the tax is unconstitutional and void because it is a tax on the exercise of the right of free speech, and is therefore a violation of the First Amendment of the Constitution. The petitioners also claim that the tax is unconstitutional and void because it is a tax on the exercise of the right of free press, and is therefore a violation of the First Amendment of the Constitution. The petitioners further claim that the tax is unconstitutional and void because it is a tax on the exercise of the right of free assembly, and is therefore a violation of the First Amendment of the Constitution. The petitioners finally claim that the tax is unconstitutional and void because it is a tax on the exercise of the right of free association, and is therefore a violation of the First Amendment of the Constitution.

judgment, amendments may be allowed, introducing any party who ought to have been joined in order to enable the plaintiff to sustain his claim 'or the defendant to make a defense or assert a cross-demand.' Any demands whatsoever of a defendant against a plaintiff may now be made the subject of a counterclaim regardless of their relation to the claim asserted by the plaintiff."

✓) Multiple counts, whether they be in law or equity, may be joined either by complaints or counterclaims. People ex rel Bradford Supply Co., Inc. v. Circuit Court of Pulaski County, 393 Ill. 520; Johnson v. Moon, 3 Ill. 2nd 561.

✓) Bearing in mind the same relief is not prayed, nor is relief prayed against the same parties in the various counts of the counterclaim, it is our opinion that the matters set forth in the second amended complaint and the counterclaim thereto present questions arising out of the same transaction or series of transactions and involve common questions of law or fact and thus meet all of the tests announced in the Johnson case.

In Nielsen v. The City of Chicago, 330 Ill. 301, at page 309 the Court said:

"The local municipality holds the streets and ways within its limits in trust for all the citizens of the State and not merely for local use, and the legislature has supreme control over them unless restrained by constitutional limitations. (Heppes Co. v. City of Chicago, 260 Ill. 506.)

Further on page 311 it was said:

"If appellant's property has been damaged by the vacation of the streets in question, the act of June 30,

[illegible]

1923, provides that the damages shall be ascertained and paid as provided by law."

We hold that the trial court erred in striking Counts Two and Three of the counterclaim as against the Village of East Dundee under the relief prayed and the grounds set forth in counter-defendants' motions to strike; in striking Count One of the counterclaim as against the Village of East Dundee, its officers, agents, servants, and employees, Fred A. Schleifer and Winifred C. Schleifer, under its general and specific prayers for relief and for the grounds set forth in counter-defendants' motions to strike; and that Count Four of the counterclaim states a cause of action against all counter-defendants except the Village of East Dundee, and that the Court erred in striking Count Four, except as to the Village of East Dundee, under the relief prayed and the grounds set forth in counter-defendants' motions to strike.

Appellees' remaining grounds for motion to strike have been waived under Rule 7 of this Court or cannot be considered, being violative of Section 45 of the Civil Practice Act.

Appellees, in their brief, have advanced other propositions of law which would be proper only on a review on the merits, consequently we refrain from expressing an opinion on those principles at this time.

The cause is reversed and remanded for further proceedings consistent with the views expressed in this opinion.

Dove PJ. Concur
McNeal J. Concur

Reversed and Remanded with Directions.

[illegible]

...in the
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... ..

14 I.A.^{2d} 259

APPEAL FROM

SUPERIOR COURT,

V.

COOK COUNTY.

Appellee.

This is an accounting suit based on an alleged breach of contract under which plaintiff claims commissions for services rendered defendant in procuring for it the American Airlines advertising account. The issues were referred to a master who found for plaintiff and recommended a decree in his favor. The Chancellor sustained exceptions to the master's report and entered a decree dismissing the suit for want of equity. Plaintiff has appealed.

Plaintiff and defendant made a written agreement in Chicago, Illinois, on April 1, 1938, under which plaintiff undertook to procure for defendant, an advertising agency, the account of American Airlines. Plaintiff succeeded in procuring the account and defendant paid monthly commissions due him under the contract until March, 1946. Thereafter, defendant did not pay the commissions although the Airline account has remained with it until the present time. Defendant stopped payment pursuant to a document signed by plaintiff on February 1, 1946, which defendant alleged terminated the contract of April 1, 1938, was an accord and satisfaction and a release of defendant from further contract obligation.

[illegible][illegible]

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Since the findings of fact by the master have not been confirmed by the Chancellor the manifest weight rule does not apply to our consideration of the findings and we are in as good a position as the Chancellor to decide the factual questions.

By the terms of the 1946 document the 1938 contract was "terminated and canceled." The parties to a contract have the right to cancel it by mutual agreement at any time (Beatty v. Guggenheim Co., 122 N. E. (N. Y.) 378, 381), and in our opinion the document, even if construed most strongly against defendant as its author, was effective on its face to cancel the 1938 contract. However, the master found specifically that the document was not delivered by plaintiff to defendant and, furthermore, that the relationship created between the parties by the 1938 contract was one of fiduciaries and therefore the transaction by which the contract was terminated was presumptively fraudulent and defendant had the obligation to show "by clear and convincing proof" that the transaction was bona fide and in good faith, but that defendant had not met this burden. Thus, the essential question is whether on the whole record, considering the relationship of the parties, the document was valid and effective to cancel the 1938 contract.

Plaintiff cites Duane Jones Company v. Burke, 306 N. Y. 192, to support his argument and the master's finding that defendants were fiduciaries of plaintiff because of their relationship in the advertising agency. The Jones case held that where the employees of an advertising agency

surreptitiously solicited the accounts they handled for that agency, and resigned en masse and formed a new agency, their conduct "fell below the standard required by the law of one acting as an agent or employee of another." (Id. p. 187.) But neither the Jones case nor any other of plaintiff's references is authority for the argument that a principal is a fiduciary of his agent and a termination of a contract, or any other transaction, which profits or saves money for the principal, is presumptively fraudulent. An agent owes a duty of loyalty and full disclosure to his principal, but we are referred to no authority for the rule that that duty is necessarily reciprocal, and the record does not justify an inference that defendant was plaintiff's fiduciary. If the law was as the plaintiff contends, it might well prevent an employer from making a profit through the services of his employees.

We have concluded that the "termination" of plaintiff's 1938 contract of employment was not presumptively fraudulent and that defendant has no burden of justifying the termination. The only remaining question is whether plaintiff delivered the 1946 document to defendant.

With respect to the 1946 document, plaintiff and defendant's witness, Van Buren, gave the only oral testimony. The master believed all of plaintiff's testimony but found that Van Buren's testimony "must be disregarded in its entirety as being untrustworthy and unreliable." He found that the document had not been delivered to defendant and

The following table shows the results of the experiments conducted on the effect of the temperature of the water on the rate of the reaction between the potassium permanganate and the oxalic acid. The results are given in the form of a table, the first column of which gives the temperature of the water in degrees Celsius, the second column gives the time in minutes and seconds, and the third column gives the volume of the gas evolved in cubic centimeters.

Temperature of water (°C)	Time (min. sec.)	Volume of gas (cc.)
15	10.00	10.0
20	8.00	12.0
25	6.00	14.0
30	4.00	16.0
35	3.00	18.0
40	2.00	20.0
45	1.00	22.0
50	0.50	24.0

From these results it is seen that the rate of the reaction increases with the temperature of the water. This is due to the fact that the molecules of the potassium permanganate and the oxalic acid move more rapidly at higher temperatures, and therefore collide more frequently and with more energy.

The following table shows the results of the experiments conducted on the effect of the concentration of the potassium permanganate on the rate of the reaction. The results are given in the form of a table, the first column of which gives the concentration of the potassium permanganate in normality, the second column gives the time in minutes and seconds, and the third column gives the volume of the gas evolved in cubic centimeters.

Concentration of potassium permanganate (N)	Time (min. sec.)	Volume of gas (cc.)
0.1	10.00	10.0
0.2	5.00	20.0
0.3	3.00	30.0
0.4	2.00	40.0
0.5	1.00	50.0

From these results it is seen that the rate of the reaction increases with the concentration of the potassium permanganate. This is due to the fact that there are more molecules of the potassium permanganate present in a given volume of solution at a higher concentration, and therefore the probability of collision with the oxalic acid is increased.

The following table shows the results of the experiments conducted on the effect of the concentration of the oxalic acid on the rate of the reaction. The results are given in the form of a table, the first column of which gives the concentration of the oxalic acid in normality, the second column gives the time in minutes and seconds, and the third column gives the volume of the gas evolved in cubic centimeters.

Concentration of oxalic acid (N)	Time (min. sec.)	Volume of gas (cc.)
0.1	10.00	10.0
0.2	5.00	20.0
0.3	3.00	30.0
0.4	2.00	40.0
0.5	1.00	50.0

From these results it is seen that the rate of the reaction increases with the concentration of the oxalic acid. This is due to the fact that there are more molecules of the oxalic acid present in a given volume of solution at a higher concentration, and therefore the probability of collision with the potassium permanganate is increased.

that any presumption of delivery had been overcome by clear and convincing testimony to the contrary.

The Chancellor in the course of his statement of decision said, "I think the master gave too little consideration and too little weight to the exhibits in this case, which speak most eloquently." We agree with the Chancellor.

On March 13, 1946, plaintiff wrote "Van" wondering "re termination of contract * * * if some kind of written notice is called for?" On March 20, 1946, plaintiff wrote, "My Dear Van: Relative to one of the important things we discussed at our shop-talk in your office last week: Regardless of the date when my contract with the agency ended there would be work which I have done * * *, billing for which will benefit the agency after the afore-mentioned termination date. * * * This is not work done * * * such as I have been doing * * * now that I am no longer an employee of the agency. Please let me know R & R's decision re above matter * * * then we can wind up many years of interesting association * * *." While this correspondence in New York City does indicate, in contradiction of Van Buren's testimony, that not all the meetings between plaintiff and Van Buren took place at the Yale club where plaintiff lived and officed, it also unmistakably implies the significant fact that when the letters were written, plaintiff and Van Buren had already been discussing the termination of the April, 1938, contract and that plaintiff considered the contractual relationship severed.

On March 29, 1946, plaintiff wrote: "My Dear Van: Re our phone talk of today, if you desire to, I'd appreciate, if you would send me, at your earliest convenience, a copy of the form you wish me to sign." On this note a line is drawn from the word "send" to a handwritten notation, "Sent 3/29/46. The letters crossed in mails." The notation, if written by Van Buren, refutes his testimony that he personally presented the document dated February 1, 1946, to plaintiff at the Yale Club. The note from plaintiff discloses that he and Van Buren discussed the document that day by telephone and also suggests an eagerness on plaintiff's part and an intention to execute the document.

Van Buren's letter referred to in his notation read: "Dear Pete: Here is * * * the termination agreement, your statement * * *, our production auditing department's statement * * *, and the statement of final settlement * * *." This is the letter which plaintiff says he received in the mail after March 29th. The master read the letter as enclosing the "so-called termination" agreement dated February 1, 1946, and noted that the letter referred to one check and not two as Van Buren testified. Van Buren stated also that the "agreement" and settlement sheets were placed before plaintiff by him personally on March 29th in the Yale Club and that the agreement was signed that day in his presence by plaintiff, but in^{an} affidavit in this proceeding Van Buren's statement is consistent with the documentary evidence and contrary to his oral testimony.

We think the master was correct in his conclusions about the discrepancies between Van Buren's testimony and the written evidence. We think the master was in error, however, in concluding that plaintiff's version was therefore true. There was more to it than "the word of Willis against the word of Van Buren" as plaintiff states in his brief.

Plaintiff testified that Van Buren's letter of March 29th and the enclosures reached him the next day, that he signed the agreement, laid it aside on his desk, reread it later that afternoon and found that the agreement was not what Van Buren had promised. He said he was considerably "provoked," "displeased," "amazed," and "dumb-founded" that Van Buren would "break his promise" and that he did not turn over the signed agreement to Van Buren. This version does not explain how defendant came into possession of the agreement signed by plaintiff, and the tone of the correspondence between plaintiff and Van Buren is not consistent with the feelings plaintiff claim arose when he discovered the "broken promise." Neither is plaintiff's acceptance of the settlement checks consistent with a claim of broken promise, nor is defendant's acquiescence in plaintiff's use of the checks consistent with plaintiff's claim that he did not deliver the signed document to defendant. There is no direct testimony of delivery, and the probability is that plaintiff did not give the document to Van Buren on March 29th. But we think the only reasonable inference is

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that plaintiff signed the contract and thereafter turned it over to Van Buren. Van Buren said he gave the document to Ames, defendant's general counsel, and this testimony is supported by the testimony of Barry Ryan, defendant's president, that Ames showed him the signed agreement in April, 1946.

We need not discuss whether the law of the place of contract or of the forum governs with respect to the question of delivery. Both New York and Illinois law hold that act and intention are the essential elements of a delivery which makes the instrument operative according to its terms. (Grannis v. Stevens, 216 N.Y. 583, 587; Condit v. Dady, 56 Ill. App. 545, 551.) In this regard, plaintiff's insistence that he never intended to and did not deliver the 1946 document to defendant is not borne out by the record. Plaintiff's writings before and after he signed the document show that he was considering "termination," that his contract with defendant was to be "ended," that he knew he was no longer an "employee" and that things were to be wound up "after many years of interesting association." We think we have shown enough to warrant our conclusion that the only reasonable inference is that plaintiff did intend to terminate the contract.

Illinois and New York law both support the rule that possession of an instrument presumes delivery. (Dunn v. Heasley, 375 Ill. 43, 48; Strough v. Wilder, 119 N.Y. 530, 534.) The language from Irving Trust v. Leff, 253 N.Y. 359, does not militate against this view. That case involved

possession of a non-negotiable instrument which a counter-claim charged was stolen. The holding was merely that the allegation that the instrument was stolen was sufficient as against the presumption of delivery arising from possession to put the facts in issue.

The instant presumption of delivery is not conclusive, but clear and convincing testimony is required to overcome it. (Layton v. Layton, 5 Ill.2d 506, Safford v. Burke, 223 N.Y.S. 626, 632.) While the Layton case involved a deed, our Supreme Court has consistently extended the presumption of delivery rule to other writings. (Kilcoin v. Ortell, 302 Ill. 531, 535; Biederman v. O'Conner, 117 Ill. 493, 497.)

We think plaintiff did not overcome the presumption of delivery. His denial of delivery is not itself enough and his version of what he did with the document after signing it is not convincing. There is no room for inference that defendant was in possession of the document by virtue of means other than delivery. We cannot accept the unfounded suggestion that defendant through some agent stole the document.

We conclude that the February 1, 1946, instrument was executed and was effective to cancel the contract of April 1, 1938.

We think the decree is correct. We need not decide any other point raised.

AFFIRMED.

FEINBERG, J., CONCURS.
LEWE, J., TOOK NO PART.

47099

14 I.A.^{2d} 260

CHARLES J. SHEMAITIS,

Appellant,

v.

CHARLES J. GALLAGHER and LEROY
FROEMKE,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

JUDGE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff appealed directly to the Supreme Court upon claimed constitutional grounds. The Supreme Court transferred the appeal to this court because no constitutional questions were involved.

This is the fifth appeal to this court by plaintiff, involving the same parties and arising out of the same transaction. Shemaitis v. Froemke, et al., 6 Ill. App. 2d 323; the consolidated appeals in Shemaitis v. Shemaitis, et al., 6 Ill. App. 2d 324; and Shemaitis v. Shemaitis, Docket No. 46914, opinion filed April 3, 1957.

In addition to these five appeals, plaintiff brought an action in the United States District Court for the Northern District of Illinois, alleging denial of his civil rights, arising out of the same transaction involved in this appeal. His action was dismissed by the District Court, and upon appeal (189 F. 2d 963) the order of the District Court was affirmed.

Plaintiff also filed an action for alleged denial of his civil rights, in the United States District Court,

against the trial judge of the Circuit Court of Cook County, who had entered the order of commitment for contempt against plaintiff. The United States District Court dismissed his complaint, and on appeal (193 F. 2d 119) the order was affirmed.

In the instant appeal the second amended complaint (the original and first amended complaint having been stricken on motion of defendants) alleges that "plaintiff was in rightful possession of the premises known as 317 West Englewood Avenue, Chicago, Illinois; that defendants, in collusion with each other, conspired to remove plaintiff from said premises by the medium of fraudulent affidavits and illegal abuse of process of the Courts of the County of Cook; that defendant Froemke initiated his certain action in the Municipal Court of Chicago, in which he alleged a landlord-tenant relationship to exist between the parties; that notwithstanding defendant Froemke's position of a landlord, defendant Gallagher wrongfully advised and did seek relief in the partition suit (47 C 14080) for a rule to show cause against plaintiff, without ever having filed his appearance in said suit, contrary to the rules of said court, resulting in an unlawful order to the sheriff to falsely evict plaintiff from said premises; that as a result of such unlawful collusion and conspiracy, plaintiff suffered false imprisonment, false eviction, and the loss of his lawn mower, six tons of coal and \$20 in cash; and that by reason of the wrongful conduct of defendants, plaintiff suffered great mental anguish and humiliation and the loss of his good name among his friends and neighbors, and has been damaged to the extent of \$10,000."

The partition suit referred to in the complaint is the same one involved in the previous appeals in this court and the one in which the trial judge in the Circuit Court entered an order of restitution against plaintiff, in favor of Froemke, the purchaser of the premises, at the partition sale. By a subsequent order plaintiff was committed for contempt for failure to restore possession to Froemke in accordance with the restitution order.

The complaint in the previous action for false arrest and imprisonment, brought in the Circuit Court of Cook County, against these defendants, contained substantially the same charges in the instant complaint. There the complaint was dismissed and on appeal the judgment was affirmed (6 Ill. App. 2d 323). We there held that there could be no claim for false arrest and imprisonment growing out of the commitment for contempt in said partition proceeding. The present complaint states no better cause of action. The allegations are a mere mass of conclusions and no facts stated. The court was fully justified in striking the complaint and dismissing the action.

Plaintiff filed a document entitled "Objections to Order of Dismissal," but there are no facts set up in the objections which would disclose any abuse of discretion of the trial court in forcing a hearing upon defendants' motion to strike the second amended complaint. The record before us reveals that plaintiff had two previous continuances when said motion to strike was heard.

In Kaufman v. Goldman, 8 Ill. App. 2d 409, we said "there should be an end to the repetitious litigation," citing Stoll v. Gottlieb, 305 U. S. 165, where it was said:

"It is just as important that there should be a place to end as that there should be a place to begin litigation."

The judgment is affirmed.

AFFIRMED.

KILEY, P.J., CONCURS.

LEWE, J., TOOK NO PART.

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FILED

AUG 22 1957

Gen. PAUL V. WUNDER
Appellate Court Second District
No. 11027

Abstract

Agenda 30

IN THE

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I.A.^{2d} 261

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A. D. 1957

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff, Defendant In Error,

vs.

HAROLD RIDDLE,

Defendant, Plaintiff In Error.

Writ of Error

to County Court

Bureau County.

CROW, J.

The defendant appeals from a judgment entered on the verdict of a jury finding him guilty under an information filed in the County Court of Bureau County. The information charged the defendant with reckless driving on March 26, 1956, in that he intentionally and maliciously drove his Plymouth automobile in the City of Princeton into the rear of an automobile parked on Peru Street, in which one James J. Boyland was then and there sitting. The Court fixed the penalty and assessed a fine of \$100.00.

The case is here on a Writ of Error. The theory of the defendant is (1) the verdict of the jury is contrary to the manifest weight of the evidence; (2) the motion of the defendant for a directed verdict should have been sustained; (3) hearsay evidence prejudiced the jury; and (4) the motion of defendant in arrest of judgment should have been sustained.

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ADJUDICATE

The following appears from a judgment rendered on the
motion of a party seeking his right under an insurance policy
in the County Court of Cook County. The insurance company
has returned with evidence showing an amount of \$100,000 in cash
to be immediately and irrevocably paid to the plaintiff's estate
in the City of Baltimore from the sum of an insurance policy
on John Brown, the which was taken in 1881 and which
expired. The Court finds the policy and awards a sum of
\$100,000.

The case is set on a writ of habeas corpus. The Court is of the
opinion that (1) the writ is granted and the sum of \$100,000 is
to be paid to the plaintiff (2) the writ is granted and the sum of
\$100,000 is to be paid to the plaintiff (3) the writ is granted and
the sum of \$100,000 is to be paid to the plaintiff (4) the writ is
granted and the sum of \$100,000 is to be paid to the plaintiff.

There were only three witnesses who testified, two of them, James J. Boyland and George Hodge, Sheriff of Bureau County, for the People, and Harold W. Riddle, defendant, in his own behalf. The People's testimony is substantially to this effect:

James J. Boyland, on March 26, 1956, drove his car from his office on East Peru Street, in Princeton, westerly to a mail box near the Post Office, which was located on West Peru Street, to mail some letters. He stopped his car, put it out of gear, and got out of the car, which was along side the mail box. He had just reached to open the door of the mail box when his car started moving. He heard the roar of the motor of the defendant's car parked immediately behind his car, and without mailing his letters he immediately got back in his own car, but not in the driver's seat and not in control of his car until the car had reached a point about 3 ft. from a building called Brainard building. Upon getting the automobile under control Boyland turned down the alley by the Brainard building, narrowly missing a semitruck, and turned west on Peru Street. He then turned around and immediately came back to the scene. He parked on the south side of Peru Street, walked across the street to the mail box and mailed his letters and then went home. Riddle's car was not there when he came back. He reported the incident to the Sheriff that night, and the State's Attorney the next morning. Boyland testified that his car was pushed over the curbing and while it was being pushed the car ran over a parking sign and the right front fender was dented thereby. He further testified that he did not use intoxicating liquors and that, although he

There were only three witnesses at the trial, but they were J. J. Jones and Walter Jones, both of whom were the father and mother of the child, and the child's father, who was the father of the child.

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knew Riddle, he never at any time spoke to Riddle. He testified that immediately before his car was shoved he noticed the defendant sitting in his car immediately behind him; and neither party said anything at this time. Sheriff Hodge testified that he knew Riddle and that Riddle came to the County Jail between 9:00 and 10:00 p.m. on the day in question, and said that he had bumped Boyland's car at or near Peru and Main Streets; that there was no damage to his (Riddle's) car, and that he did not believe there was any to the other fellow's.

Defendant Riddle testified that he knew Boyland; that he saw Boyland come out of his office about 9:00 p.m., and as he came along and while Riddle was changing cars, Boyland's car sideswiped him -- he was hit on the leg by Boyland's right fender. He (Riddle) was intending to mail some letters to his wife and put the letters in the mail box on the South side of the Post Office, on Peru Street. He says that as he was driving westerly on Peru Street, he saw Boyland's car weave back and forth, sometimes over the white line, sometimes in the lane of traffic. When Riddle got to the mail box he slowed down and suddenly Boyland's car hit his car as if in reverse; that immediately Boyland tore out under his own power, tore through the bushes, over the curb and tore down a parking sign; that Boyland drove his car 80 to 105 feet before he got control of it. He admitted on cross examination that he had told the Sheriff that he had bumped his friend's (Boyland) car. He testified that he did not intentionally hit Boyland's car or act with any malice; that he did not push that car any of the 96 feet; and that his motor was not running after the one bump. He admitted that he had had trouble

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with Boyland ever an injunction since 1953. He testified that Boyland's reputation for sobriety is bad, but upon cross examination he admitted that he never talked to anyone about it and that this was his own personal opinion. He said that he had seen Boyland drinking; that he did not know what Boyland drank but thought it might be whisky. He further testified that that night he (Riddle) had had a sandwich and a glass of beer.

Although the defendant has assigned four errors, he has confined his argument to but one, and that may be summarized as: the State did not prove defendant guilty beyond a reasonable doubt, by reason of which the trial court erred in not directing a verdict of not guilty, and that in such case it becomes the duty of this Court to reverse the judgment of conviction.

In criminal cases, where a verdict of guilty is returned by a jury, it is the duty of the Appellate Court to carefully consider the evidence and reverse the judgment if the evidence is not sufficient to remove all reasonable doubt of the defendant's guilt: PEOPLE v. SCOTT (1951) 407 Ill. 301.

It is apparent that there is a sharp conflict in the evidence and that there are at least two versions from which the jury could have chosen, one of which could support a verdict of guilty. In order to justify a verdict of guilty, the jury necessarily had to reject the defendant's testimony. The jury may reject defendant's story if, in itself, it is so remarkable as to almost seem incredible if there were no contradictory evidence, PEOPLE v. MORRIS (1912) 254 Ill. 559, or if the story of defendant was so improbable as to justify its being disregarded by them, or if it was contradicted by the facts and

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circumstances shown in the record, PEOPLE v. STRAUSE, (1920) 290 Ill. 259, 278, or if defendant's story was so unreasonable as to be judged improbable: PEOPLE v. MEYERS (1953) 412 Ill. 136, 145; PEOPLE v. UHER (1941) 375 Ill. 499, 502.

Upon examination of the testimony of the defendant Riddle, we believe it unreasonable that Boyland would get back in his car and without mailing his letters drive his car and "tear out of there", run through some shrubbery and knock down a "No Parking" sign. It is clear from the testimony that Boyland and Riddle had had some difficulties in the past and that Boyland avoided a quarrel with the defendant that night when his car was first bumped by saying nothing and going about his business. Riddle's testimony about Boyland's reputation for being a drinking man is not borne out by the evidence. He had no basis for his opinion that Boyland's general reputation for sobriety was bad. We further point out that at one point in his testimony he stated that Boyland's car had hit his car, as if in reverse, and then at another point admitting that he had told the Sheriff that he had bumped a car and he believed that it was his friend Boyland's car.

The mere fact that the evidence is conflicting does not furnish any basis for a reversal, nor will such a conflict cause this court to substitute its judgment for that of the jury or trial court: PEOPLE v. MEYERS, supra.

The sufficiency of the evidence depends solely upon the credibility of the witnesses and the weight to be given their testimony. The jury saw and heard the witnesses testify, ob-

served their conduct and demeanor. They accepted the version of the incident testified to by the complaining witness Boyland and we believe this evidence supports the verdict of guilty.

The judgment of the trial court will be affirmed.

A F F I R M E D .

Hove P.J. Concur.

The balance of the fund will be returned to the donor.

11-12-1951

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Abstract

No. 11046

Publish Abstract Only

Agenda 4

IN THE

14 I.A.^{2d} 261

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, SECOND DIVISION

MAY TERM, A. D. 1957

FILED

AUG 26 1957

PAUL V. WUNDER
Clerk Appellate Court Second District

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error.

vs.

B. BARBER and J. W. BARBER,

Plaintiffs in Error.

Writ of error to the
County Court of
Woodford County.

CROW--P.J.

This is an appeal to review a judgment of conviction entered on a jury verdict finding defendants guilty for violation of section 376, Division I of the Criminal Code (Sec. 376, Div. I. Ch. 38, Ill. Rev. Stat. 1955).

Section 376 of the Criminal Code provides, in part, as follows: "If any two or more persons shall combine for the purpose of depriving the owner or possessor of property of its lawful use and management,such persons so offending shall be fined not exceeding \$500.00 or confined in the County jail not exceeding six months."

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OFFICE OF THE ATTORNEY GENERAL

SECOND DISTRICT, NEW YORK

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AUL V. WUNDER
U.S. Appellate Court Second District

THE STATE OF NEW YORK
County of New York
In and for the City and County of New York

THE PEOPLE OF THE STATE OF
NEW YORK
vs.
J. J. WUNDER
Defendant

That in an appeal as before a judgment of conviction
entered on a jury verdict finding defendant guilty of
violation of section 271, Division 1 of the Criminal Code, 1901,
the State, by and through the undersigned, its attorney,
appears and is represented by counsel, to wit: the
undersigned, who are duly sworn and qualified to practice law
in the State of New York, and who are authorized to appear
and defend the defendant in this case, and to make such
plea and defense as may be required, and to do all such
other acts and things as may be necessary and proper to
conduct the defense of the defendant in this case.

The information provided, in part, that the defendants on February 15, 1955:

".....did willfully, feloniously and unlawfully combine for the purpose of depriving one Donald James Riling of the possession of a 1955 Ford Station Wagon from the lawful use and management of said motor vehicle, in that the defendants did then and there without just cause or provocation take from said motor vehicle the keys thereof and the credentials of the said Donald James Riling and deprived the said Donald James Riling of the keys to the said motor vehicle and the said credentials, and arming themselves with .38 caliber revolvers, deny to said Donald James Riling the right to remove said motor vehicle from the premises in violation of Section 376 of Division I of the Criminal Code of the State of Illinois, contrary to the Statute, in such case made and provided....."

The trial court at the instance of the state instructed the jury that if they found the defendants guilty the form of verdict was to be: "We, the jury, find the defendants guilty of intimidation by combination in manner and form as charged in the Information, and fix the penalty _____." (Underscoring ours.)

The verdict returned and signed by the jury stated: "We, the jury, find the defendants guilty of intimidation by combination in manner and form as charged in the information and fix the penalty \$200.00 fine." (Underscoring ours.)

The section of the Criminal Code under which this case is prosecuted defines no such crime as "intimidation by combination." We know of no such crime as "intimidation by

The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, and the Bureau of Reclamation, and is being furnished to you for your information.

The first point is the location of the water treatment plant. It is situated in the center of the city, which is a disadvantage. The second point is the cost of the plant. It is estimated to be around \$10 million. The third point is the capacity of the plant. It is designed to handle 10 million gallons of water per day. The fourth point is the quality of the water. It is expected to be of high quality. The fifth point is the time to complete the project. It is estimated to be around 18 months. The sixth point is the impact on the environment. It is expected to be minimal. The seventh point is the impact on the community. It is expected to be positive. The eighth point is the impact on the economy. It is expected to be positive. The ninth point is the impact on the culture. It is expected to be positive. The tenth point is the impact on the society. It is expected to be positive.

combination." The court erred in giving the above instruction at the request of the state. The law requires that the jury shall be instructed only concerning the crime charged. The giving of an instruction defining a different offense is not cured by the presence of an accurate one, because it cannot be shown whether the jury followed the correct or the erroneous instruction. People v. Stanko, 402 Ill. 558, 84 N.E. 2d. 839.

In the Illinois Revised Statutes, 1955, State Bar Association Edition, in Division I of the Criminal Code, there is the word "Intimidation" in capital letters in the center of the column preceding sections 376 to 383, inclusive. The word "Intimidation" ^a is so placed ~~as a form of indexing by the publishers and~~ does not constitute any part of the crime defined in section 376. The word "intimidation" or words "intimidation by combination" do not appear in section 376. In sections 377 and 378 the word "intimidation" does appear, but said sections define entirely different crimes than what is defined under section 376. Accordingly, the verdict finding defendants guilty of "intimidation by combination" and the judgment entered thereon are contrary to law and the section of the statute under which defendants were charged and tried. The judgment of conviction must therefore be reversed.

Since the judgment of conviction must be reversed for the reasons stated we have no occasion to pass on the other assignments of error. Accordingly, the judgment of conviction

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is reversed and this cause remanded for a new trial.

Judgment reversed and remanded for a new trial.

*Wright, J.
concur*

SOLFISBURG, J. CONCURS

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Abstract

Gen. No. 10980

Agenda No. 3

FILED

AUG 27 1957

AUL V. WUNDER
Clerk Appellate Court Second District

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1957

FRED L. CLARK, a minor by FLORA
CLARK, his mother and next friend,
Plaintiff-Appellant,

-vs-

ROCKFORD YELLOW CAB & TRANSFER CO.,
a corporation, RALPH CALVERT,
JOSEPH SCIAME, and ANTHONY SCIAME,
Defendants,

ROCKFORD YELLOW CAB & TRANSFER CO.,
a corporation, and ANTHONY SCIAME,
Appellees.

14 I.A.^{2d} 262

Appeal from
Circuit Court,
Winnebago County.

CROW, J.

A suit was brought by Fred L. Clark, a minor, by Flora Clark, his mother and next friend, against the Rockford Yellow Cab & Transfer Company, a corporation, and Anthony Sciamé, to recover damages for personal injuries sustained while riding as a passenger in a taxicab of the Rockford Yellow Cab & Transfer Company by reason of a collision with that cab and an automobile driven by Anthony Sciamé. A similar action was brought by Flora Clark for damages resulting from personal injury while riding in the same taxicab, at the same time, against the same parties. The two causes

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were consolidated for trial and the jury found defendant Rockford Yellow Cab & Transfer Company guilty on the claim of Flora Clark and assessed damages at \$20,706.00, and found Anthony Sciane not guilty; as to the claim of Fred L. Clark, a minor, the jury found the defendants, Rockford Yellow Cab etc. Company and Anthony Sciane, not guilty. Judgment was entered on the verdict of plaintiff Flora Clark for \$15,000.00, a remittitur having been filed. Judgments were entered on the other several verdicts. No motion to set aside the verdict on the claim of Flora Clark was filed. However, motions to set aside the other respective verdicts and for a new trial were denied by the Circuit Court of Winnebago County and this appeal results.

Plaintiff's theory of the case is that he was denied fair trial, that the court erred in the exclusion of evidence, that the court erred in submitting the special interrogatories to the jury, that the court erred in refusing to give to the jury proper instructions tendered by the plaintiff, that the court erred in giving to the jury improper instructions tendered by the defendants, and that the verdict, special findings, and judgment are against the manifest weight of the evidence.

Eleven acts of negligence were charged in the complaint of Fred L. Clark against the Rockford Yellow Cab etc. Company, and ten acts of negligence charged against the defendant Sciane. It appears from the evidence that the Rockford Yellow Cab etc. Company was engaged in the operation of a fleet of taxicabs for the transportation of passengers for hire in Rockford, Illinois; that Ralph Calvert was employed as a driver by it; that on December 24, 1950 while driving a taxicab, owned by the Rock-

ford Yellow Cab etc. Company, in a northerly direction along South Main Street and approaching the intersection with Morgan Street, he had a collision with a car driven by Anthony Sciane, who was proceeding in a westerly direction along Morgan Street, and approaching an intersection with South Main Street. Fred L. Clark, then 12 years of age, was riding as a passenger for hire in the taxicab, accompanied by his mother, Flora Clark, his brother, Floyd Raymond Clark, and a sister, Sharon Clark, all passengers in the taxicab proceeding to their home at 716 South Main Street, Rockford, Illinois. Plaintiff Fred L. Clark, a minor, alleges that as a direct and proximate result of the collision between the car operated by the Cab Company and the Chevrolet automobile driven by Sciane, plaintiff Clark was thrown into and against parts of the taxicab and sustained injuries to his head and body.

Two of the charges of negligence against the Rockford Yellow Cab etc. Co., denominated (h) and (j), respectively, were: "Failed to obey the traffic control device at the intersection" and "Drove the taxicab through a red or stop light at the intersection." The evidence further discloses that there were traffic control lights at the intersection of South Main Street with Morgan Street; that the light at the Southeast corner of the intersection was not in operation, being in the process of repair, but the other lights were in operation.

Anthony Sciane, one of the defendants, was called and examined as an adverse witness at the instance of the plaintiff. He testified that he was driving his Chevrolet automobile along Morgan Street and approaching its intersection with South Main Street. As he approached it, he was traveling at the same rate

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Two of the objects of the League are to secure the abolition of the slave trade and to secure the abolition of slavery.

Nothing better, but if the Government, the nation and
united as an entire nation in the defense of the Republic.
We believe that we can defeat the Communist revolution and
bring peace and independence to the American people.
There is no question as to the necessity of the war.

that he had been traveling. He observed the taxicab driven by Ralph Calvert. It was 5 to 7 feet south of the building line. After he realized that the driver of the taxicab wasn't going to stop he applied his brakes. He didn't blow his horn, flash his lights or anything. He figured that the taxicab was going to stop. The brakes on his automobile were in good condition. The headlights were in operation. He observed the traffic control device at the northeast corner of the intersection and it showed a green light. At that time he saw the cab approaching from his left. The light was still green in front of him as he entered the intersection. The cab proceeded to cross the intersection through the red light, which was at the northwest corner. The front of his car struck the right rear fender of the cab and the left rear fender of the cab struck the left front wheel of a third vehicle which happened to be in the intersection.

The defendant Rockford Yellow Cab etc. Co. moved to strike all of this testimony and the trial court struck it, insofar as it applied to the defendant Rockford Yellow Cab etc. Company. Under the factual situation we believe his (Sciame) testimony was admissible against the defendant Rockford Yellow Cab etc. Co. and the Court erred in this respect. EDWARDS v. MARTIN, 2 Ill. App. 2d 34.

Ralph Calvert, driver for the Rockford Yellow Cab etc. Co., was an extra driver. He stated he entered the street intersection without looking - he did not see any red light as he approached the intersection; he saw a car approaching from the right, but he continued to drive in a straight line at 20 m.p.h. after he saw the car to his right. He states that there was a

traffic light turned red on the northeast corner, but he did not see it because his head was turned to the right on account of his watching Mrs. Clark, a passenger in his cab, and trying to settle her down.

The jury's verdict awarding damages to Flora Clark, mother of Fred L. Clark, as against the Rockford Yellow Cab etc. Co., conclusively shows negligence on the part of the Rockford Yellow Cab etc. Co. Fred L. Clark, a minor, charged the same act of negligence in his complaint against the Rockford Yellow Cab etc. Co. as did his mother. Counsel for appellee Rockford Yellow Cab etc. Co. in their Brief, apparently trying to explain the inconsistency of the jury's finding in this regard, say: "The mystery concerning the injuries allegedly sustained the plaintiff, Fred L. Clark, at the time of the happening of this accident, we submit, was a good and sufficient reason for the jury to have arrived at a verdict of not guilty. We submit that no complaint was made by Fred L. Clark at the scene of the accident. Fred L. Clark wholly failed to sustain the burden of proof incumbent on any plaintiff. Any bump which he may have had on his head when he entered the office of Dr. Roberts on December 28th should have been shown to have been the result of this accident. He wholly failed to reveal to the jury how he may have received a bump on his head as a result of this accident. He didn't hit his mother and he didn't tell the jury what he did hit with his head. He got up and walked home. He was merely thrown sideways against people. So far as the proof is concerned, there is a complete lack of any explanation for his having sustained any injuries."

We find no merit in this argument. There is positive testimony of Fred L. Clark that immediately after the accident he

[illegible][illegible]

went home with his brother and sister; that he had a bruise on his head; that he had pain after the accident and before he entered Dr. Robert's office the next day. He had pain from the bump on his head and in his back and left side; that he had nose bleeds at the time he was treated by Dr. Roberts, and the last nose bleed he had was about two months ago; the bump on his head was on the left side about two or three inches above the top of the ear; the cab went across the street northwest when the back end was hit on the right side, and he was thrown sideways toward the left side.

Dr. Eric G. Roberts, a duly licensed physician and surgeon, testified that he had been acquainted with Flora Clark and Fred L. Clark for approximately 11 years; that he made an examination of Fred the day after the accident; that Fred complained of pain on his left side, pain in the back mainly on the left, headache and dizziness. He found a contusion over the left side of his skull and a contusion over the back in the area of the upper lumbar vertebra and the lower dorsal vertebra; that he sent Fred to the hospital on December 28, 1950 to have X-Rays taken; and that he had a moderate amount of cerebral concussion, but there were no fractures. The customary charges for his medical services were \$65.00.

We have read carefully the evidence produced on the trial and we believe the jury's finding and the judgment thereon, as to the claim of Fred L. Clark against the Rockford Yellow Cab and Transfer Company, is against the manifest weight of the evidence and that it must be reversed and remanded for a new trial as to the defendant Rockford Yellow Cab and Transfer Company.

The defendant Sciame requested the Court to submit the following special interrogatories to the jury:

[illegible]

"Does the jury find from a preponderance of the evidence that the defendant Anthony Sciame was guilty of one or more acts or omissions charged against him, and that said acts or omissions, if any, constituted negligence as defined in the instructions of the court?"

"Does the jury find that the negligence, if any, of the defendant Anthony Sciame proximately caused or proximately contributed to cause the occurrence in question?"

Counsel for plaintiff Fred L. Clark made objection but the Court overruled the objection and submitted to the jury the two questions. The jury answered each question - "No".

We believe the ruling of the Trial Judge was correct. The interrogatories were proper in form and substance. An instruction was given the jury setting forth the negligence charged. Where an ultimate fact which would control a general verdict is to be determined by the jury, it is error to refuse to submit, when requested so to do, a special interrogatory, the answer to which would determine the jury's finding as to that fact. LEONARD v. STONE (1943) 381 Ill. 343, 345; JONES v. PHILLIPS (1953) 349 Ill. App. 393 (Abst. Opin.) 110 N. E. 2nd 758. Appellant cites no authority in behalf of his contention that the special interrogatories should not have been submitted.

On this appeal plaintiff alleges error in the refusal of the Trial Court to give plaintiff's tendered instructions Nos. 2, 5, and 6, and further alleges error of the trial court in giving defendant Rockford Yellow Cab's instructions Nos. 2, 13, 14, 16, 17, 18 and 21, but again, and we say, significantly, plaintiff has cited no authority to sustain his position except with regard to defendant Sciame's instruction No. 2. His contentions consist only

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of words and no authorities. It is not the duty of the reviewing court to search for errors or enter upon an independent investigation on the court's own motion in order to find material or authority upon which to base a judgment of reversal. PEOPLE v. POSTER (1919) 288 Ill. 371. As to defendant Sciams's instruction No. 2, we believe that the ruling of the Trial Court on this instruction was correct. An instruction relative to the pleadings is proper.

A contention is made by appellant that the ruling of the Trial Court striking the testimony of Flora Clark to the effect that Fred L. Clark appeared to be in pain after the accident, is reversible error. No reference is made to the abstract where such ruling and testimony may be found. Appellant has failed to comply with Rule 7 of the Uniform Appellate Court Rules, effective January 1, 1956, in this respect, and under these circumstances we will not consider such alleged errors in exclusion of evidence. COAL CREEK DRAINAGE & LEVEE DIST. v. SANITARY DIST. of CHICAGO (1929) 254 Ill. App. 289, 305; SORRELLS v. SPRINGFIELD CONSOLIDATED R. CO. (1920) 216 Ill. App. 1, 5; ALPE v. SUPERIOR COAL CO. (1918) 208 Ill. App. 67.

The judgment finding the issues in favor of the defendant, Anthony Sciams, on the complaint of Fred L. Clark, a minor, will be affirmed. The judgment finding the issues in favor of the defendant, Rockford Yellow Cab and Transfer Company, on the complaint of Fred L. Clark will be reversed and remanded for a new trial.

Dove & J. Conners

AFFIRMED - as to Anthony Sciams

REVERSED - as to Rockford Yellow Cab & Transfer Company.

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the South (CLPS) in the United States. It is noted that the CLPS is a group of persons who are active in the United States and who are active in the United States. It is noted that the CLPS is a group of persons who are active in the United States and who are active in the United States.

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BARTHOLOMEW H. FINN, IRENE FINN,
HOWARD E. FINN, EARL R. FINN,
PATRICIA N. FINN and MADELINE
H. CHILDS,

Appellees,

v.

THE RETIREMENT BOARD OF THE
POLICEMEN'S ANNUITY AND BENEFIT
FUND OF CHICAGO, and EDMUND T.
LENTZ, Executor of the Last
Will of ANNA FINN, Deceased,

Defendants,

Appeal of EDMUND T. LENTZ,
Executor of the Last Will of
ANNA FINN, Deceased,

Appellant.

14 I.A.^{2d} 501

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE ROBSON DELIVERED THE
OPINION OF THE COURT.

This was a complaint for declaratory judgment to
construe a provision of the act governing the Policemen's
Annuity and Benefit Fund of Chicago pertaining to a refund
due upon the death of the widow of a policeman. The trial
court overruled the motion of defendant Edmund T. Lentz,
executor under the last will and testament of Anna Finn,
deceased, to strike the complaint. He elected to stand
on his motion to strike and the court entered judgment.
The issue is one of law only. It involves the interpreta-
tion of Section 39(e) of the Act governing the Policemen's
Annuity and Benefit Fund of Chicago which reads as follows:

"* * *[A]nd if there be no such children such amount
shall be refunded and paid to the administrator or
executor of the estate of such deceased policeman;

and if there be no administrator or executor as afore-said, then the money so to be refunded may be applied toward the payment of the burial expenses of such deceased policeman and any balance remaining after the payment of such burial expenses shall be paid to the heirs of such policeman according to the law pertaining to the estates of deceased persons." (Emphases ours.)

Defendant contends that the Act properly construed provides that the heirs-at-law of the policeman are determined as of the date of his death and not at the date of death of his surviving widow.

The essential facts set forth in the complaint are that Francis J. Finn, a member of the police force, died on July 21, 1954. He had contributed to the Policemen's Annuity and Benefit Fund of Chicago the sum of \$4,092.14. He died intestate, leaving him surviving as of the date of his death, his widow Anna Finn, Bartholomew H. and Howard E. Finn, brothers, and Madeline H. Childs, a niece. His widow died on July 4, 1955, leaving a last will and testament, which was admitted to probate in the Probate Court of Cook County. Defendant is the executor under the will. After the death of Francis J. Finn, his widow received payments from the Annuity and Benefit Fund of Chicago in the total amount of \$1,380.86. A balance of \$2,711.28 remained in the fund. No executor or administrator was ever appointed for the estate of Francis J. Finn.

The same factual situation was presented to this court in In re Estate of Weldon, 337 Ill. App. 270. (Leave to appeal was denied 341 Ill. App. xiii.) The decision is determinative of the issue before us. In that case the

court construed Section 39(e) of the Municipal Employees' Annuity and Benefit Fund Act (Ill. Rev. Stat. 1945, chap. 24, par. 1082). There the language to be interpreted was the same as that which we have emphasized in Section 39(e) of the case before us. The court held on page 274:

"The requirement under the Act that the refund be paid to the administrator or executor means that the refund is the property of the employee that shall pass as testate or intestate property upon his death, the same as any other property belonging to him, and the further provision of the Act that in the absence of an administrator or executor, the balance, after burial expenses, shall be paid to the employee's heirs 'according to the law pertaining to the estates of deceased persons' emphasizes this meaning. The fact that Redmond Weldon's widow was the beneficiary of his pension payments in no way deprived her of her rights as his heir-at-law, and there are no words in the pension statute which repeal or endeavor to repeal the statute of descent."

The court in that case concluded that the fund vested in the heirs of the employee as of the date of his death. In the instant case, therefore, the fund was vested in Anna Finn, widow of Francis J. Finn, the policeman, as of the date of his death. Defendant, as the executor under the last will and testament of Anna Finn, deceased, is entitled to the balance remaining in the fund on the date of her death. The trial court erred in overruling defendant's motion to strike the complaint. The order of the trial court is reversed and the cause remanded with directions to sustain the defendant's motion.

Order reversed and cause
remanded with directions.

Schwartz and McCormick, JJ., concur.

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DAVID A. STICKELBER,

Appellant,

v.

LYRIC OPERA OF CHICAGO, a
corporation, formerly Opera
Theatre Association, a
corporation,

Appellee.

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14 I.A.^{2d} 502

APPEAL FROM

MUNICIPAL COURT

OF OAK PARK

MR. PRESIDING JUSTICE ROBSON DELIVERED THE OPINION OF THE
COURT.

Plaintiff confessed judgment against the defendant Lyric Opera of Chicago, upon a note in the sum of \$9,600 executed by the Lyric Theatre of Chicago, an Illinois corporation. The court upon motion of defendant set aside the judgment. Plaintiff appeals.

The sole question presented for decision is whether or not a judgment may be confessed against a corporation other than the one which executed the warrant of attorney. The facts essential to our decision are that the Lyric Theatre of Chicago was dissolved by order of the Superior Court of Cook County in June of 1956. The assets of the Lyric Theatre were transferred to defendant. It assumed all the debts and obligations of the Lyric Theatre.

Plaintiff argues that because the defendant received all the assets and assumed the debts of the Lyric Theatre he should be entitled to have his judgment entered against defendant. The law of Illinois is that a power to confess judgment must be clearly given and strictly pursued and a departure from the authority conferred will render the judgment void. Chase v. Dana, 44 Ill. 262; Whitney v. Bohlen, 157 Ill. 571; Keen v. Bump, 286 Ill. 11; Wells v. Durst Chevrolet Co., 341 Ill. 108; Liberty National Bank v. Vance, 3 Ill. App. 2d 1.

In the instant case the power of attorney was executed by the Lyric Theatre which was a separate and distinct entity from defendant. The court had no power to depart from the authority conferred by the power of attorney in entering judgment against defendant. It was therefore void and there was no alternative but to set it aside. The order of the trial court is affirmed.

JUDGMENT AFFIRMED.

Schwartz and McCormick, JJ., concur.

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47141

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14 I.A.^{2d} 502

OPAL I. BRADSHAW, Administratrix of
the Estate of Hugh H. Bradshaw,
Deceased,

Appellee,

v.

PHILIP P. SAPORITO,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO

MR. PRESIDING

JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On November 5, 1954, Opal I. Bradshaw, Administratrix of the Estate of Hugh H. Bradshaw, deceased, procured a judgment by confession in the amount of \$5,889.38 against Philip P. Saporito. The judgment is based on two notes containing warrants of attorney signed by the defendant and payable to Hugh H. Bradshaw, one dated February 27, 1951, for \$3,000 and the other dated July 13, 1951, for \$2,000. Interest and attorney's fees were included in the judgment. On a motion of the defendant the court on December 2, 1954, ordered that the judgment be opened, that leave be given to the defendant to appear and defend, that the supporting affidavit stand as a defense and that the judgment stand as security. The defendant made a jury demand. Plaintiff filed a motion for a summary judgment on the ground that the defenses asserted were insufficient in law. The defendant also filed an amendment to his defense and a motion for a summary judgment on the ground that plaintiff's claim was unfounded in law and for other reasons. On January 25, 1956, the court sustained plaintiff's motion for a summary judgment

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and confirmed the judgment theretofore entered. There was no appeal from this judgment. On September 27, 1956, the defendant filed a petition under Section 72 of the Civil Practice Act, praying that the judgment be opened, that he be permitted to introduce the testimony of a certain witness, that the plaintiff be permitted to introduce contravening evidence, that the matter be submitted to a jury and that judgment be entered on the verdict. The plaintiff filed an affidavit by one of her attorneys outlining the proceedings theretofore had. The court denied the prayer of defendant's petition and he appealed.

The summary judgment confirming the preceding judgment was entered on January 25, 1956. There was no appeal. The petition for relief under Section 72 of the Civil Practice Act, filed on September 27, 1956, is based upon an allegation that the defendant had located a witness to an account stated between defendant and plaintiff's intestate, whose whereabouts were unknown to him at the time of the hearing on the motion for a summary judgment. The summary judgment from which relief is sought was entered upon findings that the defendant's pleadings were insufficient to state a defense to the cause of action. At the time of the hearing on the motion for a summary judgment the defendant knew of the witness and of her knowledge of the case about which she could testify. The record does not indicate that the defendant sought a postponement of the hearing of the motion for a summary judgment in order to search for and procure the presence of

-3-

the witness. As defendant did not appeal from the summary judgment he is not in a position to level an attack against it. In entering the summary judgment the court did not hear any testimony. It considered only the pleadings, the affidavits and the arguments of counsel. In Taylor v. Wright, 400 Ill. 179, the court said (184): "A bill of review cannot be made to function as an appeal or writ of error." It is interesting to note that no affidavit by the witness, setting out what her testimony would be, was presented to the court. We are of the opinion that the court was right in denying plaintiff's petition.

Therefore the order of the Municipal Court of Chicago entered October 15, 1956, is affirmed.

ORDER AFFIRMED

FRIEND, J., Concurs
BRYANT, J, Took no part

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14 I.A.²⁴ 503

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. ALDA E. KOHOUT and THE
TEXAS COMPANY, a Delaware Corporation,

Petitioners,

On Appeal of ALDA E. KOHOUT,

Appellant,

v.

VILLAGE OF NORTH RIVERSIDE, a Munic-
ipal Corporation, et al.,

Defendants-Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

JUDGE FRIEND DELIVERED THE OPINION OF THE COURT.

Alda E. Kohout, as owner of property located on the southeast corner of Cermak Road and 14th Avenue in the Village of North Riverside, Illinois, and The Texas Company, a Delaware corporation, as lessee of the property, sought by mandamus to compel the board of trustees of the village to issue a permit for the construction of a gasoline service station and driveways over the curb and sidewalk of the property. A motion to strike and dismiss the petition on the ground that it was insufficient in law was overruled, and defendants answered. Plaintiffs filed a reply, trial was had before the court without a jury, and pursuant to hearing, at which no witnesses were called by defendants, the application for a writ of mandamus was denied. Alda Kohout appeals.

The essential facts disclose that on February 8, 1956 The Texas Company, lessee of Alda E. Kohout, the owner of the property, submitted to the president and the board of trustees of the village an application for a permit to construct

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a gasoline station and driveways thereto on the corner of the property. Complete plans and specifications, in accordance with the Municipal Code (article XII, section 15-1220) were filed with the application. No objection was made by the board of trustees then or at any other time to the application, plans or specifications, and no defects or deficiencies therein were ever pointed out by the board. A permit was obtained by The Texas Company on January 26, 1956 from the State division of fire prevention, department of public safety, for the installation of various gasoline, fuel-oil and waste-oil storage tanks and pump islands on the property. On February 27, 1956 the State bureau of traffic of the division of highways issued to The Texas Company a permit for the construction of two thirty-five foot wide driveways from the property to Cermak Road, a State highway. The property is located in an area zoned for commercial purposes, including gasoline stations. There are no schools, churches or homes on Cermak Road in the village; there are stores, two apartment buildings are being constructed ten blocks from the property in question, a large International Harvester Company warehouse is on the north side of Cermak Road directly across from the property here in question, four gasoline service stations are already located on Cermak Road in the village, and a fifth is under construction. A fenced-in golf course and a forest preserve are located about a mile from the property.

The board of trustees of the village held the corporation's permit application for over two months; finally,

on April 12, 1956, it decided not to issue a permit, the result of three votes for issuance, three votes against, and the president abstaining. Neither at the meeting of April 12, 1956 nor in the notice of April 19, 1956 sent by the board of trustees to the property owner was any reason given for the denial of the permit. The only information ever made available with reference to the denial of the permit was contained in a letter of April 19, 1956, written by J. Slezak, Jr., the village clerk, addressed to Kohout Brothers, and reading as follows: "Relative to your application for a permit to construct a gasoline station at 9050 W. Cermak Road, North Riverside, Illinois. According to discussion and legal opinion made at a Village Board meeting held April 12, 1956, the Village Board has the right to grant or deny permit applications for driveways over sidewalks, which is part and parcel of the permit application submitted by you. As a result, a motion for issuance of such permit failed to pass."

Subsequently, on May 18, 1956, plaintiffs filed their petition for writ of mandamus, and on June 20, 1956 an order was entered overruling the motion to dismiss the petition. Thereafter the village and members of the board of trustees answered the petition, to which plaintiffs filed a reply. A notice to admit facts, in accordance with rule 18 (1) of the Supreme Court (Ill. Rev. Stat. 1955, ch. 110, sec. 101.18 (1)) was served July 5, 1956 on the attorney for the defendants, who disregarded the notice. The trial court was of the opinion that such a notice did not apply to matters denied in the answer.

Plaintiffs contend that they complied in all respects with the ordinance of the village concerning building permits and gasoline service stations, that the action of the board in refusing to point out any objections to the application for a permit, and in refusing to issue one for the construction of a service station in an area admittedly zoned for commercial purposes, was arbitrary, capricious and unreasonable; and that the action of the president of the board in refusing to vote upon the application was an arbitrary and unreasonable violation of his duty.

Defendants, on the other hand, have consistently taken the position that they may, in their absolute discretion, with or without a reason, issue or refuse to issue a building permit for a gasoline service station. They have never raised any objection to or pointed out any defects in the applications, plans or specifications filed. They also refused, at the meeting at which the permit was denied, in the notice of denial, and at all other times, to assign any reason for the denial. Their only attempt to explain the denial occurred on trial, when they were called as adverse witnesses; at that time they made vague references to heavy pedestrian and vehicular traffic at the site of the driveways which, so they asserted, constituted safety hazards.

There is no contention that the ordinances of the village relating to service-station permits are invalid. In the circumstances the question arises whether the officers of a municipal corporation have an absolute discretion, and whether they may act arbitrarily or capriciously in issuing

The first thing I noticed when I stepped out
of the car was the cold. It was a sharp contrast to the
warmth of the car. I shivered and pulled my coat
tighter around me. The air was crisp and clear, and I
could see the stars in the night sky. I took a deep
breath and felt a sense of peace. The world was so
quiet, and I was alone. I walked down the street,
my footsteps echoing on the pavement. The moon was
full and bright, and its light illuminated the scene.
I felt a sense of wonder and awe. The universe was so
vast and beautiful. I was a small part of it, but I
was here. I was alive. I was free. I was home.

or denying building permits. This question has been considered and passed upon in this state on several occasions. In People v. Village of Oak Park, 268 Ill. 256, the court affirmed an order granting a petition for writ of mandamus compelling the issuance of a building permit for the erection of a dairy station in a commercial zone. Plans and specifications there filed were in accordance with the village ordinances, except that the applicant had failed to have them approved by the commissioner of public works. This objection on the part of defendants was rejected by the Supreme Court with the comment that although the commissioner was shown to have been present at the meetings of the committee of the trustees when the plans were under consideration and to have withheld his approval thereof, "he is not a party to the suit nor does he need to be, for under section 1 of the ordinance it is the duty of the trustees to grant the permit when the application is in substantial accordance with the provisions of the ordinance, . . . and the failure of the commissioner to give his approval thereto will not relieve the trustees from performance of the duty imposed upon them."

In People v. City of Chicago, 261 Ill. 16, the court, after pointing out that there were certain subjects over which the city has control, and that as to these subjects it may pass all necessary police ordinances, pertinently observed that "even if the municipality is clothed with the whole police power of the State, it would still not have the power

to deprive a citizen of valuable property rights under the guise of prohibiting or regulating some business or occupation that has no tendency whatever to injure the public health or public morals or interfere with the general welfare

. . . The owner of property has the constitutional right to make any use of it he desires, so long as he does not endanger or threaten the safety, health and comfort or general welfare of the public."

In the instant case there was full compliance with the terms of the building and driveway ordinances of the village, and no objection was made at any time by the trustees to the application, plans or specifications. A similar situation arose in People ex rel. Piolet Bros. v. Village of McCook, 3 Ill. App. 2nd 543. There it appeared that substantial compliance was made with the village ordinance regulating the issuance of permits for the operation of junk yards. The trustees delayed any action upon the permit for a period of months and then passed a new ordinance in effect limiting to one the number of junk yards in the village. After granting a permit to another applicant and refusing to state any objection to the plaintiffs' application, the trustees denied them a permit. The Appellate Court affirmed the order granting the writ for mandamus and said: "It is the unquestioned law of this State that in granting licenses a municipality may use reasonable discretion. The exercise of that discretion, however, cannot be arbitrary, governed by fancy, caprice or prejudice. It must be sound

discretion guided by law, legal and regular. Such ordinances should be open to all upon the same terms and conditions. City of Chicago v. Rumpff, 45 Ill. 90; Zanone v. Mound City, 103 Ill. 552; Harrison v. People, 101 Ill. App. 224; People ex rel. Zaransky v. Chicago, 293 Ill. App. 301. Where discrimination exists, mandamus is the proper action to compel municipal authorities to grant a license. Zanone v. Mound City, supra, at 558. . . . Defendants argue that plaintiffs were not entitled to a license to operate a junk yard because at the time they made application they did not have title to the property, nor the right to immediate possession, nor the present right to build. They therefore could not complain of any action of defendants taken prior to March 27, 1953, when they took title. . . . Defendants' contention possesses little merit. First, they made no such objection to plaintiffs' applications. Instead, they contrived numerous other reasons for denying plaintiffs a license." It will be observed that the trustees in the case at bar followed a course of conduct similar to that attempted by the trustees of McCook.

In People v. Norvell, 368 Ill. 325, arbitrary administration of a municipal-building ordinance was disapproved. Plaintiff there filed a mandamus petition and was awarded a writ. The building commissioner had refused to issue a building permit on the ground that the property to be used "did not have its principal frontage upon a 'street or officially approved place,' as provided by the zoning ordinance." In passing upon the question presented the court said: "The privilege of a citizen to use his property

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according to his own will is not only a liberty but a property right, subject only to such restraints as the common welfare may require, and while new burdens may be placed on the property when the public welfare demands it, this power is limited to enactments having direct reference to the public health, comfort, safety, morals and welfare. . . . Any ordinance which invests arbitrary power in a public official which may be used in the interests of some to the exclusion of others is unreasonable and void. . . . The ordinance before us prescribes no conditions or terms upon which the commissioner of buildings is to determine what shall be an 'officially approved place.' In this respect his action is neither controlled, limited nor guided by any rules, definitions or requirements in the ordinance. So far as that enactment is concerned he is left free to approve a private way proposed by one citizen while disapproving a similar one for some one else. For this one reason . . . it is necessary to hold that the circuit court of Peoria county reached a correct conclusion, and its judgment will be affirmed." See also People v. City of Savanna, 6 Ill. App. 2d 411.

It is urged by defendants, and the trial court evidently adopted the view, that the authority of a village board to grant or deny permits to construct driveways over public sidewalks may be exercised as the trustees see fit, with or without a reason. Their contention appears to be based principally upon Wilmot v. City of Chicago, 328 Ill. 552. In that case an ordinance provided for a city-council

order for a permit to build a driveway over a public walk if the proposed construction would elevate or depress the grade of the sidewalk; if the driveway would not alter the grade of the sidewalk the permit could be issued by the department of public works without council order. Plaintiff, whose driveway would have changed the sidewalk grade, requested the alderman of the ward in which the property was located to obtain a council order authorizing construction of the driveway. Upon refusal of the alderman to obtain such an order plaintiff, on advice of his counsel that the provision for a council order as a prerequisite for such permit was void, proceeded to construct a driveway and a gasoline station without a permit. When the police stopped the construction work he filed an injunction suit to restrain the city and the police from interfering therewith. The Supreme Court reversed the restraining order and held the ordinance valid, saying: "He seeks to prevent interference with his illegal and unauthorized act of destroying a lawfully established sidewalk grade. . . . To allow a property owner to arrogate to himself the right to change the grade of a sidewalk where it has been established by the city council, in the manner sought to be done by appellee, would put it within the power of the property owner to render the sidewalk dangerous to persons using the same." The Wilmot case was a chancery proceeding for injunctional relief, not a mandamus action, and can be readily distinguished from the instant proceeding. Instead of making a bona fide effort to comply with the terms of the ordinance, plaintiff in the Wilmot case, failing to

prevail upon the alderman to obtain the required permit, in complete disregard of the terms of the ordinance proceeded to construct a driveway without a permit; moreover, he planned to change the sidewalk level in a manner which the Supreme Court said "might well be the cause of many accidents"

There is the additional circumstance in the instant case that plaintiffs fully complied with all the terms of the building and driveway ordinances of the village; there was no defiance of them; nor is there any claim that the plaintiff corporation proposed to make a dangerous alteration to the sidewalk level. As a matter of fact, the plans and specifications submitted do not provide for any change in the grade of the sidewalk or parkway. Under the undisputed testimony the driveways can be constructed in accordance with the plans and specifications without making any change in the grade of the sidewalk or parkway, and plaintiffs state that they would have no objection if the mandamus writ had issued specifying that the driveway to 14th Avenue would have to be constructed without altering the existing grade of the sidewalk and parkway.

The law is well settled in this State that regulating ordinances must be uniform, fair and impartial in their application so that all applicants will be treated alike. Father Basil's Lodge v. City of Chicago, 393 Ill. 246; Rohrbach v. Cavallini, 210 Ill. App. 182; McQuillin, Municipal Corporations, 3rd ed. (1949), sec. 26.203.

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The remaining question relates to the refusal of the president of the board of trustees to vote upon the application. Section 9-44 of chapter 24, Illinois Revised Statutes 1955, provides that the mayor of a village shall preside at all meetings of a city council, and (1) where the vote of the aldermen upon any ordinance, resolution or motion has resulted in a tie, or (2) where one-half of the aldermen elected have voted in favor of an ordinance, resolution or motion even though there is no tie vote, "the mayor shall vote." The statute also provides (sec. 9-75) that the president of any village shall preside at all meetings of the board of trustees, and except as otherwise provided in the Act—and there is no exception applicable to this case—shall have the same powers and perform the same duties as the mayor of a city. Under the well-established rule of construction the word "shall" in its common and ordinary meaning is construed to be imperative and compulsory as opposed to permissive. Weill v. Centralia Service and Oil Co. 320 Ill. App. 397; in accord, Clarke v. City of Chicago, 185 Ill. 354. Accordingly, we think the failure or refusal of the president of the board to vote upon the application of plaintiff corporation was a violation of duty.

So far as we are able to understand the position of defendants, they argue that plaintiffs are not entitled to the writ because they are unable to show a clear and undeniable right to the permit; that corporate authorities are not obliged to disclose the defects, if any, in either the plans or specifications submitted; and that the action being one of

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mandamus, the failure of the president of the village to vote upon the application is not ground for allowing the writ. We have discussed and passed upon all these contentions and consider them without merit. Accordingly, the judgment of the trial court dismissing the petition for mandamus is reversed, and the cause remanded with directions that the writ of mandamus be issued as prayed.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P.J. CONCURS.

BRYANT, J. TOOK NO PART.

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EMANUEL M. BOOCK,
Appellee,

v.

L. O. NAPIER and M. A. NAPIER,
individually, and L. O. NAPIER,
doing business as THE UNITED
RESERVE INSURANCE AGENCY, and
L. O. NAPIER and MADELINE NAPIER,
doing business as L AND M AGENCY,
Appellants.

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14 I.A.^{2d} 504

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

THE COURT ADOPTS THE FOLLOWING OPINION, WRITTEN BY
JUDGE NIEMEYER, AS THE OPINION OF THE COURT.

Defendants appeal from a decree awarding plaintiff
\$73,441.13, with interest from March 31, 1955, on an
accounting pursuant to a decree of September 28, 1953,
affirmed by this court (3 Ill. App.2d 19), leave to appeal
to the Supreme court denied in September 1954 (3 Ill.2d 627).

Plaintiff's suit, instituted January 23, 1951,
asked an accounting as to commissions due plaintiff as
manager and promotor of the sale of insurance under contracts
dated February 12, 1946 and May 1, 1947. Two counterclaims
were filed August 3, 1951. In the first, both defendants
alleged breach of the contracts by plaintiff in speaking of
and concerning defendant L. O. Napier (hereafter called
Napier), certain false and defamatory words, to-wit:
"L. O. Napier is incompetent." "If I (plaintiff) leave,
Napier's business will collapse because he is not competent
to manage his own business." Defendants concede that this
counterclaim was disposed of adversely to them by this
court in determining plaintiff's right to an accounting.

THE UNIVERSITY OF CHICAGO

The second counterclaim is a slander action by Napier based on the speaking of the same words. The ad damnum is \$50,000. This counterclaim has never been at issue and no steps have ever been taken by Napier to get it at issue.

By the decree of September 28, 1953 the case was referred to L. A. Wescott, master in chancery, to take the accounting. On October 6, 1954 Napier filed a written motion to vacate the reference, supported by his affidavit stating that "he fears that he will not receive a fair or impartial hearing or trial before Master in Chancery, L. A. Wescott, in this cause for the reason that the said Master is prejudiced against him." This motion and a further motion to stay the proceedings were denied.

October 11, 1954, at a hearing before the master, the parties agreed that the accounting be made by Napier's accountants, with plaintiff checking the work as it progressed. Before February 16, 1955 the accountants tendered to plaintiff a final audit, with the exception of the account with the Colonial Insurance Company in Ohio. This audit showed approximately \$51,000 or \$52,000 due plaintiff.

In the meantime plaintiff and Napier were discussing and investigating what is referred to in the case as the "Lifetime Deal"--the sale of a type of insurance not previously handled by them. On February 16, 1955 they signed a memorandum relating to the deal, written in longhand by Napier, and reading: "I agree to pay E. M. Boock 866.66 (plus travel expenses) per month plus a percentage of the Agency income

of the Lifetime Agency on a mutually agreeable contract to be drawn up later and to confirm this arrangement." On March 1, 1955 they signed a formal contract, terminable at the will of either party upon serving written notice upon the other party 60 days in advance, in which Napier agreed to pay plaintiff \$866.66 per month, together with reimbursement of necessary traveling expenses, and 10 per cent of the net cash commissions earned and received by Napier's agencies on the Lifetime business and on life insurance business written from or in addition to the Lifetime business. Napier left for Europe March 21st and did not return to his office until May 3, 1955. After a conference on May 4th with Napier, William Schneider, his auditor and chief accountant, and James, his son, wherein plaintiff's complaint of lack of cooperation in promoting the Lifetime Deal was discussed, plaintiff abandoned the contract. Semimonthly payments of salary and commissions were made covering the period from February 1, 1955 to and including May 2, 1955.

The next hearing before the master, after October 11, 1954, was on the afternoon of April 7, 1955. At the outset of this hearing Mr. Short, attorney for defendants, stated that defendants were away, and that he, the attorney, learned to his surprise at 11:30 that morning that Napier presumably felt that he had settled the case; that Napier's son James came to him, the attorney, that morning, bringing some documents dated March 1, 1955, which without explanation from anyone would indicate that the matter had been settled;

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that if he assumed the papers were a settlement of the case, then the matters were settled without his knowledge and he wanted the record so to reflect; that he communicated with Mr. Gerrard, who contacted his client, the plaintiff, who disputes the fact that there is a settlement. Mr. Short asked for a continuance before the master on the ground that a motion to dismiss the case on the basis of a settlement had to be made before the court. The instruments upon which counsel relied were the contract of March 1, 1955 and a letter of the same date signed by plaintiff, as follows:

"To Whom It May Concern:

Mr. L. O. Napier and I have resolved and settled all of our differences and I am now employed by him."

The master denied the continuance. The hearing was short. Schneider and A. W. Wetterer, an accountant employed by Napier who worked with Schneider on the audit, who were present in response to subpoenas served by plaintiff, produced the audit hereinbefore referred to. Witnesses testified briefly to a disputed item of \$7,320, which plaintiff claimed was an exchange of checks between himself and Napier and not a payment on his commissions. Nothing further was done before the master until Napier returned from Europe.

On May 10, 1955 Napier filed a written motion to dismiss the case with prejudice, on the ground that all causes of action between the parties had been compromised and settled. This motion is based upon the memorandum of February 16, 1955 in Napier's handwriting, in which, in addition to the language

heretofore quoted, appears the following: "and we hereby agree to release each other from all previous claims."

Plaintiff answered that these words were added to the memorandum after he signed it. On May 24, 1955, over objection of defendants, supported by the affidavit of Napier that defendants feared they would not receive a fair and impartial hearing before Master Wescott because of the prejudice of the master against them, the motion to dismiss was referred to Master Wescott.

Thereafter hearings were had before the master on the issues raised by the motion to dismiss and on the accounting. The master made a report, finding that the memorandum of February 16, 1955 had been altered and the words "and we hereby agree to release each other from all previous claims" added thereto after its execution; that the motion of Napier for the dismissal of the case upon the ground that there had been a settlement and compromise, accord and satisfaction and release, is without reasonable cause, untrue and not made in good faith; that there is due the plaintiff from the defendants the sum of \$73,441.13 together with interest thereon at the rate of 5 per cent per annum from said date, which does not include the amounts due from the Colonial Insurance Company of Toledo, Ohio. Objections to the report were overruled; these objections, standing as exceptions, were overruled by the court. The decree found the above sum due plaintiff and ordered execution if same was not paid within 30 days. Defendants appeal.

They do not contend on appeal that the amount found to be due plaintiff on the accounting is incorrect. The principal basis of the appeal is the alleged error in denying the motion to dismiss. Other alleged errors are the reference of the cause to Master Wescott over defendants' objections of prejudice against them, and the ordering of execution on the decree without the express finding prescribed in section 50 (2) of the Civil Practice Act. (Ill. Rev. Stats. 1955, chap. 110, par. 50.)

The oral testimony as to the contents of the memorandum of February 16, 1955 when it was signed by the parties is in direct conflict. Napier testified that the first time he talked with plaintiff about a release of his claims against him, Napier, was on February 16, 1955--the day on which he wrote the memorandum of release; that plaintiff, Schneider and Wetterer were present when he signed it; that it contained the words "and we hereby agree to release each other from all previous claims"; that plaintiff then signed it, and he, Napier, handed it to Schneider and told him to file it away. Schneider, who was not in the employ of Napier when he testified, and Wetterer, corroborate Napier as to the signing and contents of the memorandum. Napier further testified that he next saw the paper on the morning of May 3, 1955 in Mr. Short's office; that it was brought to Mr. Short by Napier's son James after a telephone call to Schneider. James Napier was a partner in the United Reserve Insurance Agency on February 16, 1955. He testified

that he came into his father's office on that day just as his father was handing a paper to Schneider; that plaintiff and Wetterer were present; that he looked at the paper and saw the words "and we hereby agree to release each other from all previous claims" in it. He did not testify to delivering the paper to Mr. Short in May.

The conduct of Napier and his witnesses prior to Napier's return from Europe is inconsistent with a valid mutual release of claims under the memorandum of February 16, 1955. The accounting was pending before the master. Plaintiff's attorneys were growing impatient with the delay in completing and filing the audit being made by Napier's employees. On February 23, 1955 Napier and plaintiff's attorney discussed relations between Napier and plaintiff. Napier did not tell plaintiff's attorney of the settlement effected by the alleged mutual release of February 16th. Napier was scheduled to leave for Europe on March 21, 1955, and did not return to his office until May 3rd following. He did not advise his attorneys of the settlement he now claims to have obtained, or ask them to have the case dismissed. Schneider testified that when he received the subpoena for the hearing before the master on April 7, 1955 he was quite indignant, throwing the subpoena on plaintiff's desk and asking, "What the hell is your attorney pulling here." On the morning of the hearing James Napier brought to Mr. Short the contract of March 1, 1955 and the letter of the same date. He did not bring, neither did he mention, the memorandum of February 16,

1955 as effecting a settlement of the suit. Schneider and Wetterer, present at the master's hearing when Mr. Short made his statement regarding the release of plaintiff's claims based on the instruments of March 1, 1955, did not advise the attorney of the agreement for mutual release in the prior instrument of February 16, 1955. This vital and important paper was not shown to Mr. Short until May 3, 1955, after Napier's return to his office.

Plaintiff testified that after spending some time in January 1955 investigating the Lifetime Deal, he asked to be put on a payroll; that on February 16th defendant wrote in longhand: "I agree to pay E. M. Boock 866.66 (plus travel expenses) per month plus a percentage of the Agency income of the Lifetime Agency on a mutually agreeable contract to be drawn up later and to confirm this arrangement," and signed his name; that plaintiff, at Napier's request, signed under the latter's name; that the words "and we hereby agree to release each other from all previous claims" were not on the paper; that neither Schneider, Wetterer nor James Napier were present when he, plaintiff, signed the paper; that they (Napier and plaintiff) agreed they would enter into a contract a little later when they had more time, and nothing else was said.

Plaintiff signed certain letters in early March 1955 containing statements that all matters and differences between himself and Napier had been resolved and settled: The letter of March 1, 1955 To Whom It May Concern, previously

referred to; letter or office memorandum dated March 7, 1955 addressed to Napier and accepted by him relating to statements and payment of commissions on the lifetime business; letter of March 7, 1955 to an agent in Minneapolis. Napier testified that he did not suggest or request the writing of these statements; that plaintiff dictated each of them. Plaintiff admitted that he dictated the letter of March 7, 1955; might have dictated the letter of March 1, 1955, but denies that he dictated the memorandum of March 7, 1955.

Napier does not testify to the purpose of the letter of March 1st To Whom It May Concern. He did testify that on February 23, 1955, when plaintiff's lawyer came to his office, he, Napier, showed the attorney a letter from a lawyer in Cleveland which said they could obtain \$40,000 in settlement of Napier's litigation in Ohio; that he did not tell him that the lawyer in Cleveland had advised him to hold out for \$60,000, and did not ask plaintiff to sign a letter for the purpose of forwarding it to Ohio or for the purpose of collecting \$60,000 to pay plaintiff. In direct contradiction of this testimony plaintiff testified that he expected to go with Napier to Ohio on the night of March 1, 1955 to get \$60,000 that Napier had promised to pay him on account; that Napier told him that he wanted some kind of a release; that he did not know who the people were the lawyer represented, and he, plaintiff, wrote it "To Whom It May Concern"; that as long as he was going to get the money, he didn't see anything wrong with it. He gave the paper to Napier. The

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record is silent as to how or in what manner such a release could affect or be in any way essential to the purchase or settlement of Napier's interest in the Ohio litigation, which is not shown to have any connection with the present suit.

The memorandum of March 7, 1955, as stated therein, was written to prevent a future misunderstanding. It related solely to statements and the payment of commissions on the Lifetime business, and permitted plaintiff to bring in an accountant at Napier's expense if the statements were not rendered promptly. It concludes: "All other matters having been settled and resolved, I ask that you join me in signing this letter for clarification." Undoubtedly the other matters referred to were terms and provisions of the contract relating to the Lifetime business, as to which there was no need of clarification. Plaintiff testified that Napier asked him to sign the memorandum for the purpose of scaring the bookkeeper into making payment to plaintiff promptly. Napier denies this and states that the memorandum was plaintiff's letter and idea.

The parties agree that the letter of May 7, 1955 was written to satisfy the agent, who did not want to make a connection with the organization when the principals were at loggerheads. Between plaintiff and Napier it cannot be used for any other purpose.

Defendants do not claim that the statements of the settlement of matters and differences between plaintiff and Napier, contained in the letters and memorandum, are in

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and of themselves releases. They do claim that the statements impeach plaintiff's testimony as to the contents of the memorandum of February 16, 1955 when plaintiff signed it, and that they are evidence of the intent of the parties and proof that the words of the release were in that memorandum when it was signed. If plaintiff's testimony as to the purpose of these instruments is rejected, no reason for their execution is shown. The state of the record as to these instruments is very unsatisfactory.

The undisputed facts in evidence as to the relations of debtor and creditor between Napier and plaintiff and the circumstances under which the purported release was obtained, are very important, if not controlling. On February 16, 1955, as plaintiff then knew, the audit prepared by Napier's accountants, complete with the exception of the commissions due from the Colonial Insurance Company in Ohio, showed approximately \$51,000 or \$52,000, without interest, due plaintiff. The only claim of Napier against plaintiff was the counterclaim in this suit, asking \$50,000 for slander. The counterclaim was never at issue. In three and a half years Napier had taken no steps to force a joinder of issue or otherwise hasten disposition of the claim. Nothing beyond a nuisance value can be claimed for this slander suit. Napier testified that he had not talked with plaintiff about a settlement of the matters involved in this suit prior to February 16, 1955. The only other consideration possible on this record is that arising out of the contract relating to the Lifetime business, to be entered into.

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As to this contract, the parties had not then agreed to the compensation to be paid plaintiff--the percentage of commissions on Lifetime business had not been determined, and there was no agreement as to the duration of the contract. Each of the contracts involved in this suit was terminable at the will of either party on giving 60 days' notice. The contract actually entered into relating to the Lifetime business contained a like provision. It is extremely improbable, if not wholly unbelievable, that a businessman with the background of plaintiff's experience would surrender a certain asset of more than \$50,000, assuming the solvency of defendants, in exchange for release of a slander suit on which defendants had slept for three and a half years and the nebulous promise of earnings under a contract the duration of which had not been determined or the compensation thereunder fixed. This is particularly true in the light of plaintiff's experience in attempting to collect commissions due under the existing contract after the right thereto had been determined in the trial court, in this court and in the Supreme court by denial of appeal.

The finding of the master, affirmed by the trial court, that the words "and we hereby agree to release each other from all previous claims" were added to the memorandum of February 16, 1955 after its execution, is fully supported by evidence of the clear and convincing character the law requires for proof of alteration of a written instrument. Lewis v. Blumenthal, 395 Ill. 588, 592. The motion to dismiss

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was properly denied. As heretofore stated, defendants do not question the amount found due on the accounting. In reaching this conclusion we have disregarded the testimony of the attorney for plaintiff before the master in chancery on defendants' motion to dismiss. The attorney represents plaintiff on a contingent fee of one-third of the amount recovered. He has not withdrawn as attorney and argued plaintiff's case orally before us. While his testimony is competent, the courts have invariably condemned the practice of an attorney testifying without withdrawing from the case, and give little, if any, weight to his testimony. Finley v. Felter, 403 Ill. 372, 379. In this case the attorney's testimony on material facts is contradicted by testimony on behalf of defendants.

Defendants assign as error the actions of the trial judges--not the judge entering the decree appealed from--in denying the motion of October 6, 1954 to vacate the reference to Master in Chancery L. A. Westcott to take the account and in referring the motion to dismiss to the same master on May 24, 1955. Defendants' motions in each instance are based on the affidavit of Napier that he feared defendants would not receive a fair trial or hearing before the master because of the prejudice of the master against the defendants. No facts supporting this conclusion were stated in the affidavit or produced on the hearing of the respective motions. There is no statute regulating or authorizing the transfer of cases from a master, and there is no need for such a

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statute. Designation of the master to whom a case is to be referred rests in the sound legal discretion of the trial judge. No reference should be made to a master where there is any evidence tending to show prejudice of the master against any party to the suit. On the other hand, reference to a master should not be denied or vacated as a matter of course because an affidavit of prejudice is filed. To hold otherwise would enable a litigant, by naming many masters in an affidavit of prejudice, to force a reference to a particular master, or one of several masters, of his own choosing. A careful examination of the record fails to show any evidence tending to indicate prejudice against the defendants. The trial judges did not abuse the discretion vested in them, and their action is affirmed.

The decree directed that an execution issue if the amount adjudged to be due to plaintiff was not paid within 30 days. The counterclaim of Napier based on his charge of slander is still pending. Defendants moved to vacate the decree because it failed to expressly find that "there is no just reason for delaying enforcement or appeal," as required by section 50 (2) of the Civil Practice Act. The motion to vacate was denied. The alleged error was not stated in the Points and Authorities or argued in defendants' original brief. Under Rule 7 of this court the objection is waived. Nevertheless, the point was earnestly urged on oral argument. We see no reason why the statute was not complied with. The specific direction in the decree that execution issue within 30 days,

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must be held tantamount to the finding required by the statute, or defendants have no right to appeal.

The decree is affirmed.

Decree Affirmed.

Burke, P. J., and Friend, J.
Bryant, J., took no part.

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14 I.A.^{2d} 505

WILLIAM JARVIS and DAEL DOEMLAND,

Appellees,

vs.

CITY OF CHICAGO, a Municipal
Corporation, MONROE LOEB and
SYLVESTER M. ALEXANDER, d/b/a LOEB
WRECKING & LUMBER CO., RICHARD
SMYKAL and JOHN WARD,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

THE COURT ADOPTS THE FOLLOWING OPINION, WRITTEN BY
JUDGE NIEMEYER, AS THE OPINION OF THE COURT.

Defendants appeal from a judgment for \$6,000
against them in plaintiffs' action for damages for the
demolition of the frame dwelling on premises at 6819 S. Yale
Avenue in the City of Chicago in June 1955, pursuant to an
ordinance passed June 23, 1953 declaring the building to be
a public nuisance and authorizing and directing the
Commissioner of Buildings to demolish the same.

The case was tried before the court without a
jury. The evidence is conflicting as to the condition of
the building at the time when it was demolished at the
direction of the City of Chicago--a fact to be determined
by the court, notwithstanding the action of the city council
in passing the ordinance. Sings v. City of Joliet, 237 Ill.
300. As the case must be reversed and remanded for want of
proper evidence supporting the finding of the court as to
the damages sustained by plaintiffs, we limit our discussion
of the evidence to that relating to the damages or value
of the building.

THE UNIVERSITY OF CHICAGO

LIBRARY

1911

THE UNIVERSITY OF CHICAGO
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The plaintiff Jarvis paid \$500 for a deed, dated December 31, 1954. The property was subject to unpaid taxes aggregating \$6,730.01 for the years 1928 to 1955, inclusive. A witness for plaintiff testified that the value of the vacant land at the time of the trial was \$1,200. No witness testified to the value of the building, and there are no facts in evidence from which this value could be determined. The unpaid taxes for a period of more than 25 years might well be greatly in excess of the value of the property, and these unpaid taxes are not evidence of value.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Burke, P. J., and Friend, J.
Bryant, J., took no part.

1890

... ..

1. *Phragmites* (common in the marshes of the lower Mississippi River and in the coastal marshes of the Gulf of Mexico).

85

Abstract A

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

May Term, A. D. 1957.

14 I.A.^{2d} 506

General No. 10130

Agenda No. 9

Blair F. Gunther and Lawrence A.)
Sadlek,)
)
Plaintiffs-Appellants,)
)
vs.)
)
Justin T. McCarthy, Director of)
Insurance of the State of Illinois,)
)
Defendant-Appellee.)

Appeal from the
Circuit Court of
Sangamon County

ROETH, J.

Polish National Alliance is a fraternal benefit society chartered in Illinois with its principal office at Chicago. At a convention of the society membership held in September, 1955, official action was taken to amend the Constitution and By-Laws of the Society in certain particulars. Thereafter in December, 1955, the Director of Insurance, under the regulatory powers vested in him over fraternal benefit societies by the Insurance Code of the State of Illinois, issued two decisions interpreting these amendments in the light of the Constitution and By-Laws of Polish National Alliance. By the one decision the Director of Insurance held that

Abstract

STATE OF ILLINOIS
COURT OF COMMON PLEAS
JUDICIAL DISTRICT

Wm. T. W. A. D. 1937.

14 I.A. 506

Volume 14, 2

General 101 10130

Appeal from the
Circuit Court of
Cook County

State F. Dunning and Lawrence F.
Dunning,
Plaintiffs-Appellants,
vs.
Lucian F. Dunning, Defendant at
Lawrence of the State of Illinois,
Defendant-Appellee.

Wm. T. W.

United States District Court for the Southern District of Illinois
appealed in Illinois with the District Court at Chicago. It
is composed of the District Court at Chicago, 1937.
Illinois action was taken to amend the Constitution and bylaws of
the Society in certain provisions. The Society in December, 1933,
the District of Illinois, under the present power vested in
has over Federal courts is included by the Insurance Code of the
State of Illinois, under the provisions relating to the Insurance
in the light of the Constitution and bylaws of the Society.
Illinois. By the action the District of Illinois is in that

Polish National Alliance was prohibited from engaging in certain practices with regard to the publications of the Society and by the other he held that ^{the} officer of the Society bearing the title "Medical Director" was not authorized to be an ex-officio member of the Board of Directors of the Society. Subsequently upon a reconsideration of these two decisions and after consideration of legal briefs submitted to the Director of Insurance, the Director on May 1, 1956, confirmed the decisions of December 15, 1955.

Section 407, subsection 1, (Ill. Rev. Stat. 1955, chap. 73, par. 1019) provides in part as follows:

"(1) Any order or decision made, issued or executed by the Director, except an order to make good an impairment of capital or surplus or a deficiency in the amount of admitted assets, whereby any company or person is aggrieved, shall be subject to review by the Circuit Court of Sangamon County or the Circuit or Superior Court of the county in which the principal office in this state of the company aggrieved by such order or decision is located, or where the person so aggrieved resides.***"

No petition to review the decisions of the Director of Insurance was filed by Polish National Alliance. However, on May 29, 1956 two individual officers of Polish National Alliance filed a petition in two counts for review. The first count of the petition is filed by Blair P. Gunther who occupies the office designated by the Constitution and By-Laws of Polish National Alliance as "Censor". Stripped of all legal verbiage Count 1 seeks a review of the decision of the Director of Insurance holding that Polish National Alliance was prohibited from engaging in certain practices with regard to the publications of the Society on the alleged ground that such

decision deprives him as such "Censor" of certain prerogatives attendant upon the office of "Censor". The second count of the petition is filed by Lawrence A. Sadlek who occupies the office designated by the Constitution and By-Laws of Polish National Alliance as "Medical Director". Stripped of all legal verbiage this count seeks a review of the second decision of the Director of Insurance holding that because of certain deficiencies in the amendments by the 1955 convention, the "Medical Director" was not authorized to be an ex-officio member of the Board of Directors of Polish National Alliance.

On June 7, 1956, the Director of Insurance through the Attorney General filed a motion to dismiss the petition upon the grounds that the petitioners were not "persons aggrieved" under Section 407, supra, and that the decisions of the Director of Insurance were not such decisions contemplated by Section 407, supra. This motion was sustained by the Circuit Court of Sangamon County and the petition was dismissed with findings, that the decisions were such as is contemplated by Section 407, supra, but that petitioners were not "persons aggrieved" within the legal contemplation of said section. A subsequent motion by petitioners to vacate this order was denied and this appeal followed.

An initial question as to procedure is raised by petitioners. It is contended by petitioners that the Director of Insurance cannot file a motion to dismiss; that in response to a petition for review he must prepare and file a complete transcript of the record; that the hearing on review is on the petition and transcript on the merits;

Section 407, which is known as "Section 407" of certain provisions
enacted upon the 15th of January, 1952. The second part of the
petition is filed by Lawrence J. Joliet who occupies the office
located by the Commission and is known as "Section 407"
Alliance as "Section 407". The third of the three
this court gave a review of the second section of the petition
of Lawrence Joliet that because of certain deficiencies in the
enactments of the 1952 constitution, the "Section 407" was not
authorised to be an ex-officio member of the Board of Directors of
Joliet National Alliance.

On June 1, 1952, the Director of Internal Affairs for
Secretary General filed a motion to dismiss the petition upon the
grounds that the petitioners were not "persons who have" under
Section 407, which was the basis of the petition of
Lawrence Joliet and that the petitioners were not "persons who have"
This motion was sustained by the Board of Directors of the
and the petition was dismissed with prejudice, and the petition
were much as in enforcement of Section 407, which was the
petitioners were not "persons who have" under the 1952
tion of the 1952 constitution. A subsequent motion of Lawrence Joliet
this motion was denied and this appeal followed.

An initial review as to procedure is raised by the petitioners.
It is contended by the petitioners that the Director of Internal Affairs
file a motion to dismiss; that in response to a petition for review
we also reviewed and the court sustained the petition; and
the petition on review is on the petition and the petition on the petition;

that no provision is made for a motion to dismiss and that the same was therefore improperly filed and improperly considered by the Circuit Court.

It would seem to be axiomatic that a petition for review filed under Section 407 supra, should show that the petitioners are "persons aggrieved" within the contemplation of said section. It likewise follows that the sufficiency of the petition to so show, should in some manner be capable of being questioned prior to a full hearing on the merits. In American Surety Co. v. Jones, 384 Ill. 222, 51 N. E. 2d 122, the procedure adopted in the case at bar, was followed in raising the question here raised. The Supreme Court apparently considered the procedure followed as proper because it decided the case on the basis of the questions raised by the motion to dismiss. A similar question was involved in the case of Winston v. Zoning Board of Appeals, 407 Ill. 588, 95 N.E. 2d 864. While this case involved a construction of the Administrative Review Act, it was there held that the absence of provisions in that Act, providing for the filing of a motion to dismiss did not preclude the use of such a motion. Attention is called to the provisions of Section 407 requiring the filing of the petition for review within 30 days from service of a copy of the decision. If the petition was not filed within the time limit could it be said that a motion to dismiss would not be proper to dispose of the matter? We think not. Likewise we are of the opinion that the motion to dismiss was properly filed in the case

that no objection is made to a motion to dismiss and that the case
was otherwise properly filed and answered as required by the
Federal Rules.

It is held that the defendant has a motion to dismiss
filed under Section 107(b)(1), which states that the defendant has
"personally appeared" within the jurisdiction of the court. It
further follows that the defendant of the motion to dismiss
must be shown to have appeared in person or by counsel at the
trial hearing on the motion. In United States v. Jones,
304 F.2d 111, 112, 51-2 U.S. 112, the procedure adopted in the case
as set out followed in relation to the motion to dismiss. The
District Court previously considered the motion to dismiss as proper
because it decided the case on the basis of the questions raised
by the motion to dismiss. A similar question was raised in
the case of United States v. Jones, 304 F.2d 111, 112,
51-2 U.S. 112. While this case involved a question of the
dispositive nature of the motion to dismiss, it was held that the motion to
dismiss is not dispositive of the issue of a motion to
dismiss and that the motion to dismiss may be withdrawn or
settled to the provisions of Section 107(b)(1) and (2) of
the Federal Rules. It is held that the motion to dismiss is not
dispositive of the issue of a motion to dismiss and that the motion to
dismiss is not dispositive of the issue of a motion to dismiss.

at bar and raises the questions sought to be raised therein.

The crux of this appeal is whether appellants are "persons aggrieved" within the meaning of Section 407, supra. In determining this question it is necessary to consider the subject matter presented to the Director for decision. In the final analysis he was called upon to interpret the Constitution and By-Laws and amendments thereto of Polish National Alliance. The decisions do not affect the rights of appellants as individuals, which is the capacity in which they file their petition. Their only interest or concern in the decisions is as officers of Polish National Alliance. Whatever interest or concern they may have arises by virtue of the provisions of the Constitution and By-Laws of Polish National Alliance and their being officers of that Society. The "aggrievement" therefore of the officer is in legal effect the "aggrievement" of the Society. In comparable situations it has been held that the society or corporation is the one which should seek the review to the exclusion of the individual officer as in Hotchkiss v. City of Calumet City, 377 Ill. 615, 37 N.E. 2d 332, (Mayor and Alderman and City); Winne v. The People ex rel. Hess, 177 Ill. 268, 52 N. E. 377, (Supervisor and County); The People ex rel. Alterfer v. City of Peoria, 378 Ill. 572, 39 N. E. 2d 42, (Commissioner of Buildings and City); White Brass Castings Co. v. Union Metal Manufacturing Co., 232 Ill. 165, 83 N. E. 540, (Stockholder and Corporation). In American Surety Co., v. Jones, supra, the Supreme Court thoroughly discussed the question of who are "persons aggrieved" as contemplated by Section 407, supra. We

are of the opinion that in view of the holding in that case and in the light of our analysis of the position of appellants, they are not "persons aggrieved" within the meaning of the statute.

Accordingly the judgment of the Circuit Court of Sangamon County will be affirmed.

Affirmed.

Carroll, P.J. and Reynolds, J., concur.

one of the conditions for the validity of the results is that the
for the time of the analysis of the results is negligible, that
are not ignored separately, which are included in the results,
theoretically the results of the results of the results.

Results.

Control, T. J. and Geydore, J., 1900.

UNITED STATES OF AMERICA

State of Illinois }
 Appellate Court } ss:
 Second District }

14 I.A.^{2d} 573

At a term of the Appellate Court, begun and held at
 Ottawa, on Tuesday, the 7th day of May, in the year of our
 Lord one thousand nine hundred and fifty-seven, within and
 for the Second District of Illinois:

Present -- Honorable FRANKLIN R. DOVE, Presiding Justice

Honorable DEWITT S. CROW, Justice

Honorable BENEDICT W. EOVALDI, Justice

PAUL V. WUNDER, Clerk

FRANCES M. LAMBERT, Sheriff

BE IT REMEMBERED, that afterwards, to-wit:

On September 27, 1957 the same being one of the days
 of the term of Court aforesaid, the Opinion of the Court
 was filed in the Clerk's Office of said Court, in the
 words and figures following, viz:

1941

[illegible]

14 I.A.^{2d} 573

1908, 1. 1.

The information in this case consisted of two
names that appeared and occurred with the name of
admitted agent and letter. The first name was of the
language of the state of the state, that is, the
state. The second name occurred in the state of the
state of December, 1908, at which time the county of
Illinois and State of Illinois were in the state of
and violently against that which and other wrongs and
did other wrongs and injuries which he and to Keith
Chapman by striking the said Keith Chapman with his fists
and by striking him with his feet about the head, face
neck, arms, shoulders, back, stomach and legs, injuries

STANDARD

inflicting severe wounds, contusions, bruises, cuts and lacerations, and thereby resulting in severe personal injuries to the said Keith Chapman.

The defendant entered a plea of not guilty and the issues thus made were submitted to a jury resulting in a verdict finding the defendant guilty of the crime of aggravated assault and battery and the verdict fixed the punishment of the defendant at imprisonment in the County Jail for a term of nine months and imposed a fine of \$50.00. After overruling motions for a new trial and in arrest of judgment, the court rendered judgment on the verdict and the record is before us for review.

~~disclosed~~

The evidence ~~tended to prove~~ that Keith Chapman, the prosecuting witness, was employed by the Tucker Insurance Agency with offices in Ottawa and had been so employed for ten years; that defendant had been a customer of that agency since 1952 and had procured from the Tucker Agency an insurance policy on his automobile which had been renewed year to year. On October 7, 1955 this policy expired and following a telephone conversation with the wife of defendant a new policy was issued and shortly prior to the expiration date of the old policy the new policy was sent by mail to the home of the defendant. On December 27, 1955 the policy not having been paid for or returned to the Insurance Agency, Mr. Chapman went to the home of the defendant to pick up the policy as he had been advised by the defendant over the phone that he, the defendant had purchased a new car and in financing it had made other arrangements for insurance.

At the visit to defendant's home on December 27, 1955, defendant's wife was unable to locate the policy after a brief search and Mr. Chapman requested her to make a further search and told her that he would come back in a few days. He explained to her it was necessary that he return the policy to the company which issued it, as it had been charged to him and was considered as outstanding and in full force and effect until it was returned.

Two days later, December 29, 1955, at about seven o'clock in the evening Chapman returned to the home of the defendant, accompanied by his wife and two infant children. He stopped his car in the driveway and went to the kitchen door, where the defendant's wife met him. He stepped into the kitchen and there saw the defendant sitting at a table with three other men whom he did not know. Chapman spoke to the defendant and inquired of Mrs. Cavanaugh whether she had been able to find the automobile policy in question. She told him she had not and he asked her to look again and ^{stated that} he would come back a few days later. At this point, the defendant arose from his chair and approached Chapman and according to the testimony of Chapman, the defendant said to him, "I don't know whether you want to stay or not. Get out of here and stay out." Chapman was standing just inside the kitchen door and according to his testimony this is what occurred: "I opened the door to leave, as he told me to and the next thing I knew he hit me in the face and I was lying on the floor, face down and not quite a pain in my left side. Then I got up and ran

to my face, and my head struck. I know it was because I
struggled to my feet and I was struck several more times.
There was a terrible noise. I heard someone say "let
him go", let him alone but he grabbed me by the front of the
coat and threw or pushed me out. As I went past I saw him
put his left leg out to kick. I tried to hurry but he was
so fast he grabbed me by the shoulder blade. I did
the best I could to get out of the garage and he caught up
with me and hit me some more times. I did the best I
could to get around in front of the car. I ran to the
driver's side of the car and attempted to open the door.
I had it partially open and he hit me several more times in
the face and nose. I was rather dazed. I knew I couldn't
get in the car so I tried to push him off of me, then he
came back and I grappled with him. We both stumbled and fell
and rolled down the driveway toward the street. A little
later they picked him up and took him away."

Charles was driven home by his wife and immediately
taken to the hospital where he remained for two days. His
nose was broken in two places, his eyes were blackened, his
teeth were cut, several teeth were loosened, his left hand
and back were lacerated and his left knee was injured and
his ribs and throat were bruised. Pictures of Charles in the
record, which were taken soon after the difficulty, show the
extent of his injuries and from these, the testimony of
the attending physician and his own testimony it is apparent
he was ^{severely} ~~severely~~ injured about the face and head and
suffered substantial injuries.

Rosemary Chapman wife of the prosecuting witness testified that when she and her husband arrived at the home of the defendant on the evening in question her husband parked the car in the driveway and she remained in the front seat of the car with her six months old baby on her lap. She testified that her husband was only in the house one or two minutes; that when the door again opened she noticed that the defendant was hitting her husband who was "stumbling around in a daze"; that in addition to the defendant there were three other men there; that she got out of the car with her baby in her arms and she heard one of those men say "Floyd that is enough" and these other men took hold of the defendant; that the defendant was using profane language and that she, Mrs. Chapman, told these other men that they could hardly call themselves men when they just stood and watched such a brutal beating; that after she said this the other men pulled the defendant off of her husband and she and her husband left and she drove the car to their home.

The defendant testified that on December 27, 1955 Mr. Chapman came to his home and introduced himself and then shook hands and Chapman/^{told}him that he, defendant, had to pay for the two months the policy was in force and wanted the policy back; that defendant told him he didn't know the policy had been written and that his wife had looked for the policy and couldn't find it but defendant said he would be back to-morrow night.

The defendant further testified that Chapman came back on the evening of December 28, 1955 while he was eating supper; that Chapman walked in the kitchen door without

knocking and asked his wife if she had found the policy and she said 'no' and Chapman then said he would be back the following night. As abstracted defendant then said: "Listen, you don't have to come back to-morrow night, or any other night. I had enough trouble about the policy." Chapman then replied: "Our company sold you insurance before that on time, they did business that way. I think your wife is lying about it. I think you have the policy here." Thereupon defendant testified he got up from the table and told him (Chapman) "to get out right now:" that Chapman then hit defendant on the shoulder with his left hand. "It hurt a little." continued the defendant, "It spun me back beside the chair. I got up and hit him once. He went down. I followed him out to see he wouldn't make any more trouble. I said, 'I don't want you back here no more': Chapman kicked me in the middle section. I went down a little bit. We clinched and wrestled. There were no blows struck in the yard. He just kicked me. When we were pulled apart by Fox and Lenac, Mrs. Chapman was cussing me and calling me a dead beat, and an obscene name and said pay your bills."

Theodore S. Lenac, Charles Freeman and Robert Fox were the three gentlemen sitting at the table with defendant in defendant's home upon the evening of December 29, 1955 and they testified in behalf of defendant, corroborating in some particulars defendant's testimony.

The deputy sheriff testified in rebuttal that shortly after the occurrence, after he had arrested defendant and while they were on their way to the jail with the

defendant, the deputy sheriff, asked defendant what he
supposed and defendant replied, "How could you say to me
that insurance man come to your place and tell your wife
that about an insurance policy." The deputy sheriff then
asked defendant, "Did he tell your wife a lie?" and
the defendant replied, "No, he didn't tell her a lie. I
was never at her home and was lying." The deputy sheriff
then asked defendant what he thought about a man who told
her that he was at her home and was lying. Defendant
replied, "No, I just had a couple of
drinks that afternoon."

Counsel for plaintiff in error, states that the
record in this case is devoid of any evidence upon which an
aggravated assault can be predicated and insists that it was error
for the court to instruct the jury that an aggravated assault
is the unlawful and violent beating of another which results
in serious personal injury as defined by the Criminal Code
(Ill. Rev. Stat., chap. 38, par. 66a) without giving to the
jury a definition of a simple assault and battery as well
as the unlawful beating of another according to the definition
of the statute (Ill. Rev. Stat., chap. 38, par. 66).

It is well established that it is not reversible
error to omit to define a lower degree of crime than that
which is charged, where the definition of the higher
crime, includes facts which constitutes the lesser
offense, in the absence of a request to do so by the defendant.
(Dunn v. The People, 109 Ill. 251; People v. Robinson,
200 Ill. 407, 312, McRae v. People, 109 Ill. 94.)

The meaning of Paragraph 54a as Paragraph 50 presents a question of fact for a jury to determine.

In *Shroyer v. State*, 43 Neb. 37, 51 N.W. 107, 1892, the phrase "great bodily injury" was under attack for the same reason as is urged here against the phrase "severe personal injury." The court there found that it was sufficiently definite and, in the course of its opinion, said: "True cases which appear to sustain a different view arise, it is believed, without exception, under statutes in which the manner and form of the assault or the instrument used is included within the definition of the offense. The term 'great bodily injury,' as employed in the statute, is perhaps not susceptible of a precise legal definition. It is, however, an injury of a graver and more serious character than ordinary battery; and whether a particular injury is within the meaning of the statute is generally a question of fact for the jury and not of law. See *State v. Gillatt*, 58 Iowa 491, 9 N.W. 352."

At the trial, Dr. Jerry De Vries testified on behalf of the People that on December 29, 1955, he was called to the Wyburn Hospital where he attended the prosecuting witness, Keith Chapman. He said he found him sitting on an examination table with his head over a pan, his nose bleeding from both nostrils and his face battered; that he examined his wounds and found that his nose was broken in two places and that he had a cut lip over the incisor tooth; that both eyes were blackened. He said that Chapman's left hand had excoriations at the knuckle and the base of the thumb, that he had lacerations

spots over the ribs, left knee and left chest, "abrasions like you would find if you brushed against gravel or sand". Counsel during the examination of this witness for the People/then asked this question; "Now, you have an opinion, based upon your medical practice over an extended period of time, as to the source of the injuries to Mr. Chapman's left hand?", and he answered, "I would say that he had all the evidence of having been - well, the common expression 'pommelled', but I might say, if the Honorable Judge would allow me, I would say that even if I couldn't ascertain from the injuries, my confidence in Keith Chapman's integrity...". Counsel for the defendant interrupted and said, "Now wait a minute, for cripes' sake. You want to get on the jury, Doctor?" The court then said: "Objection sustained." ~~xxx~~ At the conclusion of the direct examination of this witness the court said: "with regard to the comments of the witness concerning the complaining/^{witness'es} integrity and so forth, the jury will be instructed to disregard the comments of the doctor in that respect and the answer will be stricken as not responsive."

Counsel for defendant insists that this statement of the witness concerning his confidence in Chapman's integrity and was highly prejudicial/^{and} partially responsible for the verdict of guilty returned by the jury. This remark of the witness was unresponsive to the question asked and a voluntary statement by the witness. The court promptly sustained the objection and struck the testimony from the record and directed the jury to disregard it. Similar instances occur in many contested trials. There are, of course, instances

where voluntary and unresponsive remarks are highly prejudicial and require reversal. In this instance, however, the striking of the unresponsive answer and instructing the jury to disregard it provided adequate protection to the defendant.

Counsel for defendant also insists that the trial court erred in giving to the jury, at the request of the People, Instructions⁹, 11, and 12. Instruction No. 9 told the jury that if "you believe from the evidence, as produced by the defendant, that Chapman made the first attack upon the defendant, still, if you further believe that the said Chapman afterwards ceased to attack the defendant and proceeded to leave the defendant's premises, and that the defendant followed after Chapman and continued assailing him when Chapman was not making any attack upon the defendant, then you are instructed that the defense of necessary self-defense is not established in law."

It is insisted that the ninth instruction assumed that the defendant followed Chapman and continued to assail him and, after so assuming, the instruction told the jury that the defense of necessary self-defense was not established. While this instruction singles out the evidence produced by the defendant and in a later portion of the instruction does not confine the jury to the evidence produced upon the trial, the import of the instruction is that if the jury believed from the evidence that Chapman made the first attack but afterward ceased and proceeded to leave the premises of the defendant, but that defendant "followed after him and continued assailing him when Chapman was not making any attack upon the defendant," then necessary self-defense was

not established as a matter of law. There were other instructions relating to self-defense which the court gave and to which counsel directs no criticism. Furthermore, the court gave ~~fourteen instructions, being~~ every instruction tendered by the defendant, and, while we do not approve this instruction, we do not believe the judgment should be reversed because of it.

Instruction No. 11 is as follows, viz.: "You are instructed that the law of self-defense, as the same is defined in these instructions, does not imply the right of attack in the first instance, nor does it permit of action done in retaliation or for revenge." Counsel insist that this instruction was contrary to the evidence as the evidence of the defendant was that Chapman struck defendant in the first instance. The testimony of Chapman, however, was otherwise and the state was entitled to have the jury instructed in support of its theory if there was evidence to support such theory. (People v. Scalisi, 324 Ill. 131; People v. Khamis, 411 Ill. 46, 53) While there would have been no error had this instruction been refused, there is evidence in this record to the effect that defendant was the first assailant and that his conduct was prompted by a spirit other than that of self-defense. Under the evidence it was not reversible error to give this instruction. (People v. Battaglia, 282 Ill. 91; Morello v. People, 226 Ill. 348, 400.)

Instruction No. 12 stated "that if a person enters another's premises quietly and with consent, the owner cannot justify turning him out without a previous request to leave."

Counsel state in their criticism of this 12th instruction that as applied to the facts disclosed by this record, Chapman entered the home of the defendant "quietly and with consent" of the defendant; that defendant ordered him to leave and he did so. Counsel insist, however, that this instruction ignores all the evidence and took away from the defendant his defense of self-defense and that the jury was, by this instruction, misled and prejudiced against the defendant. The instruction is an abstract proposition and should have been refused. We do not believe, however, that it took away from defendant his defense of self-defense and when considered with other given instructions defendant was ^{not} prejudiced thereby.

Counsel state that the Supreme Court in *People v. Duran*, 307 Ill. 611, at p. 621, condemned an instruction of the character of People's Instruction No. 7. This instruction is as follows, viz.: "You are instructed that a person is privileged in law to employ force, if necessary, in his own self-defense; that only such force as is necessary for protection is authorized." This instruction was followed by People's Instruction No. 8, which told the jury that before a defendant can avail himself of the right of self-defense, it must appear to him, acting as a reasonable person, that at the time of the attack the danger to him or his family was apparently so urgent and pressing that his action was necessary in order to prevent bodily harm to the defendant or his family. Then follows Instruction No. 9, set out in this opinion, and Instruction No. 9 was followed by People's Instruction No. 10 and this instruction told the jury "that

a person has no right to use any more force in self-defense, as the same is defined in these instructions, than he, acting as a reasonable person, would deem necessary under like circumstances." These instructions were followed by the first given instruction offered by defendant, which told the jury that "these instructions are given and should be considered as one entire series and each instruction should be considered in connection with all instructions bearing upon the same subject." The Durand case does not hold that the instructions given in the instant case were erroneous and require the reversal of this judgment. Taken as a series and not being directive or peremptory in form we do not believe counsel's criticism of the several instructions complained of is justified. The record discloses that the court gave fourteen instructions offered by the People and twelve offered by the defendant. One instruction offered by defendant was refused, but it was covered by another given instruction and no complaint is made of the action of the trial court in so doing. Some of the given instructions were more favorable to defendant than he was entitled to and taken altogether we do not believe defendant has any just cause of complaint.

Counsel for defendant finally insists that the rights of the defendant were prejudiced by the continued use of leading and suggestive questions by the assistant State's Attorney who tried the case. The record does disclose that a number of leading questions were asked. It also shows that when objection was made the court, in most instances, sustained the objection and if the question had been answered the court struck the answer and directed the jury to disregard the same. This is about all that can be done.

The evidence was conflicting, but the jury heard the testimony of the several witnesses and resolved the conflicts in the testimony in favor of the People and against the defendant. The jury did not believe the version which the defendant and his friends gave of what transpired on the night of December 29, 1955. The defendant positively testified he hit Chapman only once; yet, the pictures in the record show that he was severely beaten about the head and face. No jury could be expected to believe that such injuries were inflicted by one blow. There are other instances of inconsistencies found in the record which would incline a court or jury to disbelieve defendant's version of this occurrence.

We have read this record and cannot say that the jury's verdict is based upon compassion for the prosecuting witness or passion or prejudice against the defendant. The evidence shows that Chapman was severely and seriously beaten. The jury, by its verdict, found that there was an aggravated assault and no justification therefor and the trial judge approved that verdict. The record is not free from error, but that is not required. No substantial right of the defendant has been invaded. He has had a fair trial and the judgment of the trial court should be and is affirmed.

Judgment affirmed.

Edw. J. Connelley

STATE OF ILLINOIS. }
APPELLATE COURT, } ss.
SECOND DISTRICT, }

PAUL V. WUNDER
I, ~~JUSTUS L. JOHNSON~~, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do
hereby certify that the foregoing is a true, full and complete copy of the opinion of the said Appel-
late Court in the above entitled cause, now of record in my said office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this.....^{21st}.....day of
.....^{July}.....in the year of our Lord one thousand
nine hundred and fifty.....^{nine}.....

Paul V. Wunder
Clerk of the Appellate Court.

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STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

May Term, A. D. 1957

14 I.A. 574

Term No. 57-M-4

Agenda No. 1

THOMAS W. BATES, Administrator of)
the Estate of Hazel L. Bates,)
Deceased, and THOMAS W. BATES,)
as an Individual,)
Plaintiff-Appellant,)
vs.)
JAMES DeBOSE and ROY KENNETH)
VAUGHN,)
Defendants-Appellees.)

- Appeal from the
Circuit Court of
White County.

CULBERTSON, P. J.

This action originates on a complaint alleging that the wrongful death of the decedent, HAZEL L. BATES, resulted from the negligence of the defendant in driving the truck belonging to defendant, ROY KENNETH VAUGHN, and driven by defendant, JAMES DeBOSE. In Count One of the complaint damages for wrongful death are claimed by THOMAS W. BATES, as administrator of the Estate of Hazel L. Bates, deceased; and in Count Two, THOMAS W. BATES seeks damages as the surviving husband of the deceased, as an

individual, under the family expense law. During the course of the trial the jury answered a special interrogatory against plaintiff, and returned verdicts in favor of defendants.

On appeal in this Court it is contended by plaintiff that the verdicts are contrary to law and the manifest weight of the evidence; that the Court erred in permitting the cross examination of occurrence witness who, co-incidentally, was an insurance adjuster whose company carried the insurance on the automobile in which plaintiff's intestate was riding; that the Court erred in permitting defendants' counsel to inquire into the financial income of plaintiff; and in the giving of certain instructions on behalf of defendants. It is also contended that the special interrogatory is contrary to the evidence, and in form, is contrary to law since the instruction referring thereto uses the term "contributory negligence" without proper definition, or without referring to proximate cause, and fails to contain the limiting phrase "at the time and place of the occurrence in question."

This action results from an accident which occurred on July 19, 1955 when the plaintiff's intestate, Hazel L. Bates, was driving her husband's automobile south on Illinois State highway number 1, near Brownsville. Riding with her was her daughter-in-law, eighteen years of age. After the automobile in which

plaintiff's intestate was riding, topped the crest of a small hill and was traveling downgrade, in overtaking a southbound gravel truck with trailer attached and meeting a northbound tractor-trailer, Mrs. Bates apparently lost control of the automobile and some part of it collided with the trailer of the gravel truck in the right traffic lane, and then collided more or less head-on with the tractor-trailer in the left traffic lane. She died three days later from the injuries sustained.

It was contended on behalf of plaintiff that the defendants' truck was pulling onto the road from the shoulder, and on behalf of the defendants that the truck was pulling off the road onto the shoulder. A number of witnesses testified. One of the eye-witnesses was an adjuster and investigator for Country Mutual Insurance Company who happened to see the accident since he was riding in his automobile immediately behind the truck coming in the opposite direction from the Bates automobile. He had with him another witness, Mrs. Retta Simmons, whose husband was also in the claim department of the same insurance company. It was stated in the record that the witness Leitch was at the time of the accident and still is, an investigator for the insurer and that the said David Simmons was District Supervisor for the company in that area.

The attorney for the defendants claimed that

there was a bias as to these witnesses by reason of their connection with the insurer because it carried collision coverage on the Bates automobile, and requested that defendants be permitted to show the connection of the two witnesses with the insured. The Court ruled that under the circumstances, since the prejudice and bias might exist, that the interest could be shown.

It is unnecessary to review in detail the evidence presented in the case. The jury returned a verdict finding defendants not guilty as to both the suit by the administrator, and the suit by Thomas W. Bates, as an individual, and returned a verdict on the special interrogatory finding against the plaintiff on the issue of contributory negligence. Plaintiff tendered six instructions in addition to the form of verdict instruction. All were given. Defendants tendered nineteen instructions in addition to the instruction as to the form of verdict on the special interrogatory. Five of the instructions were refused and the others were given.

The evidence in the case showed that the deceased was traveling on a wet black-top pavement, on a well-traveled public highway. She topped the crest at a speed of approximately sixty miles per hour, without being able to see what was on the other side of the crest. As her automobile went over the crest of the hill and started downgrade, the Jury could have concluded she was

either not looking directly ahead or that she saw the gravel truck and tractor-trailer and misjudged the relative speeds of all the vehicles and the distances. The gravel truck was at least 500 feet south of the crest of the hill and the deceased apparently continued straight ahead in her traffic lane without doing anything until she was at least 250 feet south of the crest. There was no evidence that her brakes were ever applied or that her horn was sounded.

Obviously, the Jury concluded that deceased failed in her duty to be on the lookout for vehicles either moving or standing on the highway ahead of her (COLLINS vs. McMULLIN, 225 Ill. App. 430, 433; HOGREFE vs. JOHNSON, 271 Ill. App. 469, 474). On the basis of the evidence in the record we cannot reverse the Jury in its special finding on the issue of contributory negligence, nor on its general verdict returned in favor of the defendants.

The employment of Leitch by the insurer of the Bates automobile was properly shown, and the Jury had the right to consider the bias and prejudice of this witness, if any, and the weight to be given to his testimony (WILLIAMS vs. MATLIN, 328 Ill. App. 645, 647).

Complaint is made of the giving of certain instructions on behalf of the defendants. While technically there may be an objection to certain aspects of these instructions, the test is not what the ingenuity of counsel

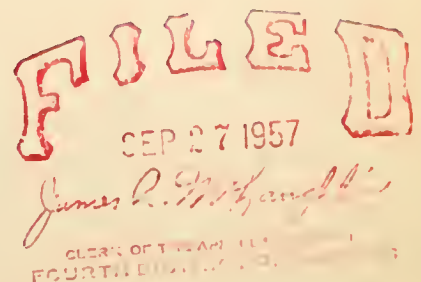
can contribute to them, but how and in what sense ordinary men acting as jurors understood them (RUSSELL vs. RICHARDSON, 302 Ill. App. 589, 603; KAVANAUGH vs. WASHBURN, 320 Ill. App. 250, 255), and if there is harmless error, reversal will not be undertaken by reason of such technical error alone (KAVANAUGH vs. WASHBURN, supra). Under the record in this case, in view of the special finding of the Jury on the issue of contributory negligence and the general verdict, we do not believe that harmless errors in instructions or in consideration of evidence relating to loss of income would justify a reversal.

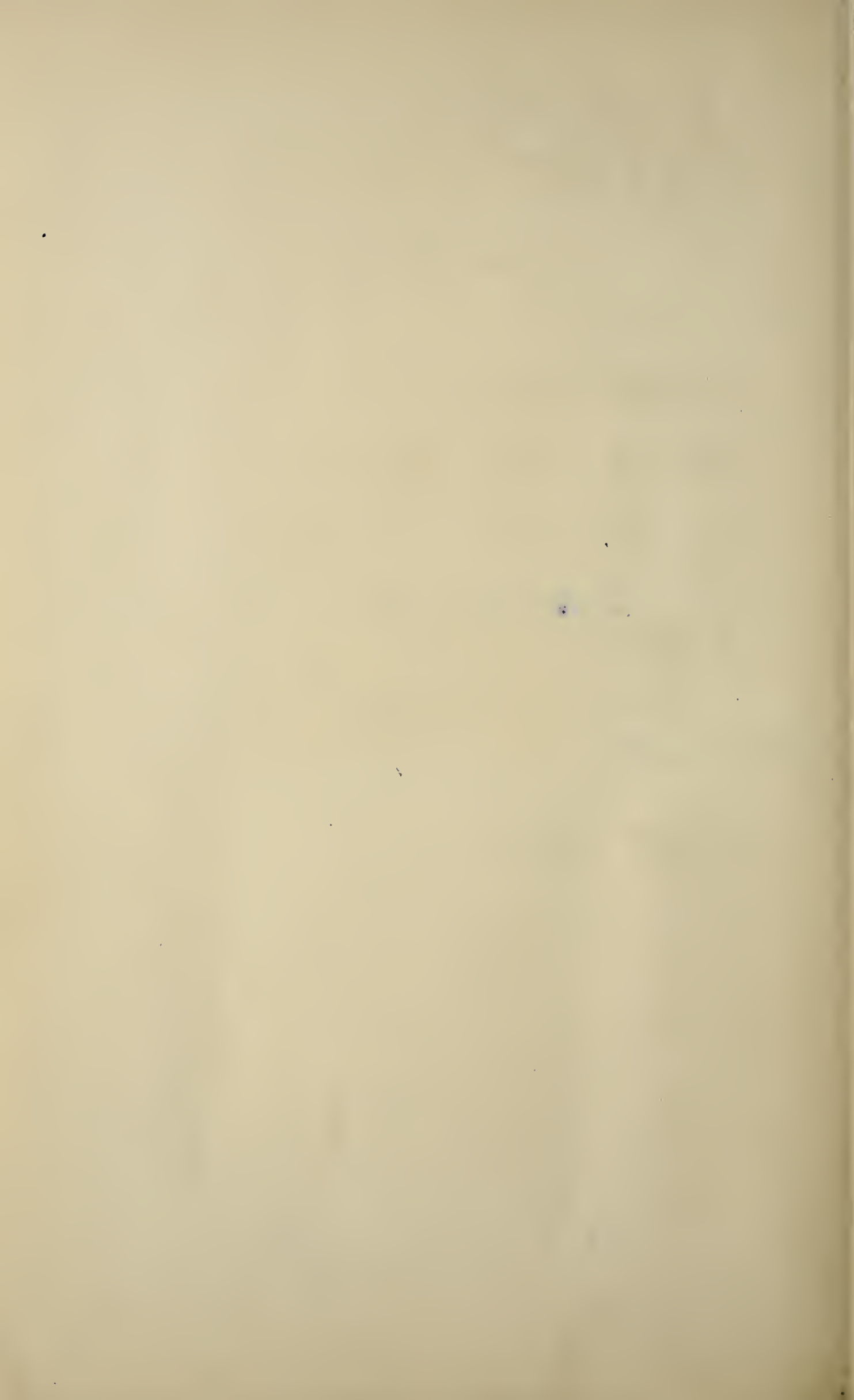
The judgment of the Circuit Court of White County will, therefore, be affirmed.

Judgment affirmed.

Bardens, J., and Scheineman, J., concur.

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